Supreme Court, U.S.
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09-257 AUG 27 2009

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No. 09-

IN THE SUPREME COURT OF THE UNITED STATES

ERICA CORDER,
Petitioner

v.

LEWIS PALMER SCHOOL DISTRICT No. 38,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

Erica Corder, a high school graduate with a 4.0 GPA, was denied her diploma until she issued a publically disseminated coerced written apology after she presented a thirty-second valedictory speech that included a religious reference. Miss Corder was one of fifteen co-valedictorians who each gave a thirty-second message during commencement. Without warning or lawful authority, the principal withheld Miss Corder's diploma until she issued a public apology, part of which was expressly dictated by the principal. Colorado law provides "that students of the public schools shall have the right to exercise freedom of speech and of the press, and no expression contained in a student publication, whether or not such publication is school-sponsored, shall be subject to prior restraint except for the types of expression described in subsection (3) of this section [obscene, defamatory, threatening harm]...."

The District Court concluded that the school district did not violate Miss Corder's First and Fourteenth Amendment rights and granted the school district's motion for judgment on the pleadings. The Tenth Circuit Court of Appeals affirmed the District Court. The questions presented for review are:

1. Whether a message delivered by a high school valedictorian who is selected by a neutral criterion of having the highest grade point average constitutes school-sponsored speech that can be censored under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), or is private student speech under *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S.

503 (1969).

2. Assuming that *Kuhlmeier* could be applied to the commencement message delivered by a student who is selected by a neutral criterion of having the highest grade point average, whether a school district's withholding of a high school valedictorian's diploma to compel her to apologize for a commencement message that included a religious reference is reasonably related to legitimate pedagogical concerns and therefore does not violate the graduate's First and Fourteenth Amendment rights.

3. Whether a school district violates a high school valedictorian's First Amendment right against compelled speech, as described in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 631 (1943) and its progeny when it withholds the graduate's diploma to compel her to publically apologize and dictate what she must say after she offered a commencement speech that included a religious reference.

PARTIES

The Petitioner is Erica Corder. Respondent is Lewis-Palmer School District No. 38.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

PARTIES iv

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 10

I. THE TENTH CIRCUIT'S DETERMINATION THAT HIGH SCHOOL VALEDICTORY MESSAGES CONSTITUTE SCHOOL-SPONSORED SPEECH GOVERNED BY *KUHLMEIER* CONFLICTS WITH THIS COURT'S STUDENT SPEECH PRECEDENTS. . . 10

II. THE TENTH CIRCUIT'S DETERMINATION THAT HIGH SCHOOL VALEDICTORY MESSAGES CONSTITUTE SCHOOL-SPONSORED SPEECH GOVERNED BY *KUHLMEIER*

CONFLICTS WITH RULINGS IN OTHER CIRCUITS AND ITS OWN PRECEDENT. 13

A. The Tenth Circuit's Determination That The Valedictory Speeches Are School-Sponsored Conflicts With Decisions In Other Circuits. 13

B. The Appellate Panel's Determination That The Valedictory Speeches Are School-Sponsored Creates An Intra-Circuit Conflict Regarding The Definition Of School-Sponsored Speech. 17

III. THE TENTH CIRCUIT'S DEFINITION OF LEGITIMATE PEDAGOGICAL CONCERNS CONFLICTS WITH THIS COURT'S PRECEDENTS. 19

IV. THE TENTH CIRCUIT'S DEFINITION OF LEGITIMATE PEDAGOGICAL CONCERNS CONFLICTS WITH ITS OWN AND OTHER CIRCUITS' DECISIONS. 23

A. The Panel's Determination That The District Satisfied The Definition Of Legitimate Pedagogical Concern Under *Kuhlmeier* Creates An Intra-Circuit Conflict. 24

B. The Panel's Determination That The

District Satisfied The Definition Of Legitimate Pedagogical Concern Under *Kuhlmeier* Conflicts With Definitions Of The Term In Other Circuits. 25

V. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS PROTECTING CITIZENS' FIRST AMENDMENT RIGHTS TO BE FREE FROM COMPELLED SPEECH. . 29

CONCLUSION 33

TABLE OF AUTHORITIES

FEDERAL CASES

Adler v. Duval County School Board,
206 F.2d 1070 (11th Cir. 2000) 13

Adler v. Duval County School Board,
250 F.3d 1330 (11th Cir. 2001) (en banc) . . . 14, 15

Axson-Flynn v. Johnson,
356 F.3d 1277 (10th Cir. 2004) 32

Bannon v. School Dist. of Palm Beach Co.,
387 F.3d 1208 (11th Cir. 2004) 26

Bethel School District v. Fraser,
478 U.S. 675 (1986) 3,10, 11, 20, 23, 31

Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 32

Chandler v. James,
180 F.3d 1254 (11th Cir. 1999) 14,15

Chandler v. Siegelman,
248 F.3d 1313 (11th Cir. 2001) 14

Curry v. Hensiner,
513 F.3d 570 (6th Cir. 2008) 26, 27

Elk Grove Unified School Dist. v. Newdow,
542 U.S. 1, 31 (2004) 31

Fleming v. Jefferson County School District R-1,
298 F.3d 918 (10th Cir. 2002) . . 17, 18, 23, 24, 25

Hazelwood School District v. Kuhlmeier,
484 U.S. 260 (1988) . ii, 3, 7, 10-12, 20, 23, 27, 31

Henerey v. City of St. Charles, School Dist.,
200 F.3d 1128 (8th Cir. 1999) 27

Ingebretsen v. Jackson Public School Dist.,
88 F.3d 274 (5th Cir. 1996) 14- 16

Jones v. Clear Creek Indep. School Dist.,
977 F.2d 963 (5th Cir. 1992) 14-16

Lemon v. Kurtzman,
403 U.S. 602 (1971) 15

Morse v. Frederick,
551 U.S. 393 (2007) 3, 12, 20, 21, 31, 32

Parents Involved in Community Schools v. Seattle School Dist., 551 U.S. 701 (2007) 20

Poling v. Murphy,
872 F.2d 757 (6th Cir. 1989) 27

Riley v. National Federation of the Blind ,
487 U.S. 781 (1988) 31

Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.,
547 U.S. 47, 61 (2006) 31

Santa Fe Independent School District v. Doe,
530 U.S. 290, 313 (2000) 14

Tinker v. Des Moines Indep. Comm. School Dist.,
393 U.S. 503 (1969) ..... ii, 3, 10, 19, 31, 32

U.S. v. Virginia,
518 U.S. 515 (1996) 20

West Virginia Board of Education v. Barnette,
319 U.S. 624 (1943) ..... iii, 30, 31

Wooley v. Maynard,
430 U.S. 705 (1977) 30, 31

FEDERAL STATUTES

28 U.S.C. §1254(1) 1

U.S. Const. amend. XIV 2

STATE STATUTES

Colo. Rev. Stat. §22-1-120 9

Colo. Rev. Stat. § 22-1-120(1) 2

Colo. Rev. Stat. § 22-1-120(3) 3

OPINIONS BELOW

The opinion of the Court of Appeals (App 1a- 36a) is reported at 566 F.3d 1219. The opinion of the District Court (App. 37a -57a) is reported at 568 F.Supp.2d 1237.

JURISDICTION

The judgment of the Court of Appeals was filed on May 29, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

> its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

> (1) The general assembly declares that students of the public schools shall have the right to exercise freedom of speech and of the press, and no expression contained in a student publication, whether or not such publication is school-sponsored, shall be subject to prior restraint except for the types of expression described in subsection (3) of this section. This section shall not prevent the advisor from encouraging expression which is consistent with high standards of English and journalism.

COLO. REV. STAT. § 22-1-120(1)

> (3) Nothing in this section shall be interpreted to authorize the publication or distribution in any media by students of the following:
>
> (a) Expression that is obscene;
>
> (b) Expression that is libelous, slanderous, or defamatory under state law;
>
> (c) Expression that is false as to any person who is not a public figure or involved in a matter of public concern; or

> (d) Expression that creates a clear and present danger of the commission of unlawful acts, the violation of lawful school regulations, or the material and substantial disruption of the orderly operation of the school or that violates the rights of others to privacy or that threatens violence to property or persons.

COLO. REV. STAT. § 22-1-120(3).

STATEMENT OF THE CASE

In the forty years since *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), this Court has balanced students' free speech rights and educators' pedagogical interests in controlling the content of student speech in the context of assemblies, *Bethel School District v. Fraser*, 478 U.S. 675 (1986), school assignments, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and extracurricular activities, *Morse v. Frederick*, 551 U.S. 393 (2007). However, this Court has not addressed the question raised by this case–whether the First Amendment permits educators to discipline a high school graduate for a commencement speech that included a religious reference. At issue is whether students continue to enjoy any free speech rights under *Tinker*, or if educators can circumvent *Tinker* by broadly defining "school-sponsored" and "legitimate pedagogical concerns" so that they can control student speech even after students have completed their education.

Petitioner, Erica Corder ("Miss Corder"), had completed her education, with excellence, when Respondent,

Lewis Palmer School District ("the District"), decided that she needed to be disciplined after she included a religious reference in her thirty-second speech given at the conclusion of the valedictory messages offered during commencement. Miss Corder was one of fifteen graduates in the class of 2006 who had obtained 4.0 grade point average and therefore earned the status of valedictorian. (App., 3a, 20a). The District permitted the valedictorians to choose whether any, some, or all of them would offer messages at commencement, and, if messages were to be offered, their general content. (App., 3a). The valedictorians of the class of 2006 decided that each of them would speak for thirty seconds and chose general topics for their speeches. (App., 3a). The valedictorians rehearsed their speeches for the principal. (App., 3a). Miss Corder offered a speech that did not include a religious reference. (App., 4a).

At the commencement ceremony, Miss Corder offered the following message:

> Throughout these lessons our teachers, parents, and let's not forget our peers have supported and encouraged us along the way. Thank you all for the past four amazing years. Because of your love and devotion to our success, we have all learned how to endure change and remain strong individuals. We are all capable of standing firm and expressing our own beliefs, which is why I need to tell you about someone who loves you more than you could ever imagine. He died for you on a cross over 2,000 years ago, yet was resurrected and is living today in heaven. His

> name is Jesus Christ. If you don't already know Him personally I encourage you to find out more about the sacrifice He made for you so that you now have the opportunity to live in eternity with Him. And we also encourage you, now that we are all ready to encounter the biggest change in our lives thus far, the transition from childhood to adulthood, to leave Lewis-Palmer with confidence and integrity. Congratulations class of 2006.

(App., 4a). At the conclusion of the ceremony, Miss Corder was told that she would not receive her diploma and had to see the principal. (App., 4a, 5a). The principal indicated to Miss Corder that she would not receive her diploma unless she publicly apologized for her valedictory speech. (App., 5a). Miss Corder submitted the following draft to the principal:

> At graduation, I know some of you may have been offended by what I said during the valedictorian speech. I did not intend to offend anyone. I also want to make it clear that [the principal] did not condone nor was he aware of my plans before giving the speech. I'm sorry I didn't share my plans with [the principal] or the other valedictorians ahead of time. The valedictorians were not aware of what I was going to say. These were my personal beliefs and may not necessarily reflect the beliefs of the other valedictorians or the school staff.

(App., 5a). The principal required that Miss Corder insert the

following statement: "I realize that, had I asked ahead of time, I would not have been allowed to say what I did." (App., 5a). The statement was distributed via e-mail to the entire Lewis Palmer community and Miss Corder received her diploma. (App., 5a).

Miss Corder filed suit, seeking declaratory relief and nominal damages for (1) violation of her free speech rights under the First Amendment; (2) compelled speech in violation of the First Amendment; (3) violation of the right to equal protection under the Fourteenth Amendment; (4) violation of freedom of religion under the First Amendment; (5) violation of Colorado Revised Statute Section 22-1-120 and (6) violation of the Establishment Clause of the First Amendment. (App., 40a). The District filed a motion for judgment on the pleadings. (App., 6a). While that motion was pending, the parties completed discovery and filed cross-motions for summary judgment. (App., 6a). The District Court then granted the District's motion for judgment on the pleadings and dismissed Miss Corder's complaint. (App., 37a-57a).

The District Court concluded that Miss Corder's speech was not private student speech governed by *Tinker*, but was school-sponsored speech governed by *Kuhlmeier*. (App., 48a-50a). The court reasoned that the District limited the opportunity to speak to valedictorians and screened the content of their speeches, so it was entitled to regulate the content of the speeches in a reasonable manner. (App., 48a). The court found that the commencement ceremony bore the imprimatur of the school. (App., 48a). The court agreed with the District that the graduation ceremony has a pedagogical concern as a final lesson for departing seniors "and that

limiting religious exhortations by student speakers would be related to a legitimate concern of not associating the school 'with any position other than neutrality on matters of political controversy.' *Hazelwood,* 484 U.S. at 272, 108 S.Ct. 562." (App., 49a). Accordingly, the court concluded, the District did not violate Miss Corder's First Amendment rights. (App., 49a). The court added that Miss Corder's actions "to evade" the screening of her speech gave the District a legitimate justification to require an apology so that the coerced statement did not amount to constitutionally prohibited compelled speech. (App., 49a-51a).

The District Court dismissed Miss Corder's Equal Protection claim because it found no indication that any other student engaged in the same conduct that Miss Corder engaged in and therefore no evidence of differential treatment. (App., 52a). Miss Corder's free exercise claim was dismissed because the court found that her religious practice was not impinged upon or burdened, but that she was merely obligated to follow the same rules as were the other valedictorians. (App., 53a). Finally, the court dismissed Miss Corder's state law claim because it found that the statute addressed only written publications, not speech, and it could not be construed to prohibit schools from regulating speech that could violate the Establishment Clause. (App., 57a).

Miss Corder appealed, and a three-judge panel of the Tenth Circuit Court of Appeals affirmed the district court. (App., 1a-36a). The appellate panel found that a valedictory speech at graduation is a "school-sponsored...expressive activity that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school," and is therefore governed by *Kuhlmeier* instead of

Tinker. (App., 18a). The panel found that the District had exercised control over the speeches and named the valedictory speakers based upon the District's qualifications. (App., 20a). Therefore, the District "was entitled to exercise editorial control over Corder's speech as along as its action was reasonably related to pedagogical concerns." (App., 20a). The court said that "pedagogical" meant"related to learning" and included non-academic concepts such as discipline, courtesy and respect for authority. (App., 18a). A pedagogical interest can be found "simply by the school district's desire to avoid controversy within a school environment."(App.,18a). Using that definition, the appellate panel found that the District's policy of reviewing valedictory speeches prior to the graduation ceremony is related to learning in that the ceremony is an opportunity to impart lessons on discipline, courtesy and respect for authority. (App., 20a). Therefore, the District did not violate Miss Corder's First Amendment rights by requiring the review of the content of her speech prior to graduation. (App., 21a).

In analyzing Miss Corder's compelled speech claim, the Tenth Circuit panel said that forced speech is no different than censored speech. (App., 23a). Therefore, according to the panel, if the District can censor Miss Corder "because her speech is school-sponsored rather than private, then so may the School District tell her what to say when she disregards the School District's policy regarding the school-sponsored speech, so long as the compulsion is related to a legitimate pedagogical purpose." (App., 24a). The appellate panel found that Miss Corder's forced apology was reasonably related to the District's pedagogical concerns, particularly concerns related to discipline. (App., 25a). "The discipline chosen by the School District for Corder's giving a speech different

from the one she submitted for review was to require her to write an apology before she could receive her diploma. This disciplinary action, taken in response to Corder's violation of the review policy, was certainly reasonable." (App., 25a). The panel concluded that speech restrictions under *Kuhlmeier* need not be the most reasonable or the only reasonable limitations, just reasonable. (App., 26a).

The appellate panel also found that Miss Corder was disciplined for her speech because she did not follow the religion-neutral policy of submitting her speech for prior review and not because of the religious content of her speech. (App., 28a). Therefore, there was no violation of Miss Corder's free exercise rights. (App., 28a). The panel also upheld the district court's conclusion that Miss Corder was not similarly situated to the other valedictorians and therefore could not assert differential treatment. (App. 29a). The appeals court added that "because Corder does not contend she is either a member of a suspect class or was denied a fundamental right, the School District's disciplinary response after her graduation speech need only be rationally related to a legitimate government purpose to pass muster under the equal protection clause." (App., 29a). Finally, the panel upheld the district court's finding that Colorado Revised Statutes §22-1-120 applied only to publications and therefore could not be applied to Miss Corder's speech. (App., 35a).

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT'S DETERMINATION THAT HIGH SCHOOL VALEDICTORY MESSAGES CONSTITUTE SCHOOL-SPONSORED SPEECH GOVERNED BY *KUHLMEIER* CONFLICTS WITH THIS COURT'S STUDENT SPEECH PRECEDENTS.

The Tenth Circuit veered significantly off the course set by this Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and other student speech cases when it concluded that the high school valedictory speeches are "school-sponsored" speech. The thirty-second valedictory speeches given by graduating high school seniors who had completed their secondary education bear none of the indicia of school sponsorship this Court described in *Kuhlmeier* or *Bethel School District v. Fraser*, 478 U.S. 675 (1986). Instead, the speeches more closely resemble the silent protests this Court found to be protected speech in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). The Tenth Circuit's rejection of *Tinker* in favor of *Kuhlmeier* conflicts with this Court's precedents.

In *Fraser*, this Court held that *Tinker* did not apply to a student's speech containing indecent language and lewd conduct given during a high school assembly held on campus during school hours as part of an educational program in self-government. *Fraser*, 478 U.S. at 677-680. The speech occurred during instructional time as part of an instructional program that was under the auspices of the school. *Id.* Therefore, it could be characterized as part of the school curriculum subject to the school's editorial control. *Id.*

Consequently, school officials were permitted to dissociate the school from the speech. *Id.* at 685.

In *Kuhlmeier*, this Court found that *Tinker* did not apply to a school newspaper created by students as part of a journalism class. *Kuhlmeier*, 484 U.S. at 270.

> The question whether the First Amendment requires a school to tolerate particular student speech–the question that we addressed in *Tinker*–is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences

Id. at 270-271. Unlike the personal expression that happened to occur on campus in *Tinker*, the newspaper in *Kuhlmeier* was a supervised learning experience for journalism students.

Id. at 270-271. In those "school-sponsored" situations, educators are entitled to exercise greater control than they are over the personal expression at issue in *Tinker* to ensure that participants learn whatever lessons the activity is designed to teach, are not exposed to inappropriate material and do not erroneously attribute the speakers' views to the school. *Id.* Therefore, in its capacity as publisher of a school newspaper or producer of a school play the school is permitted to dissociate itself from speech that interferes with education, impinges upon student rights or is unsuitable. *Id.* A key consideration in *Kuhlmeier* was the fact that the expressive activity was disseminated under the auspices of the school and therefore, in the minds of parents, students and the public it would be associated with the school, *i.e.*, bear its imprimatur. As Justice Alito said, *Kuhlmeier* permits a school to regulate what is, in essence, its own speech. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

Unlike the newspaper articles in *Kuhlmeier* and the speech in *Fraser*, the thirty-second speeches offered by Miss Corder and her co-valedictorians were not part of the school's instructional program and could not be characterized as part of the curriculum. The speeches were presented at commencement, an honorary event that commemorates the completion of high school. Miss Corder and her fellow valedictorians had completed the instructional program. There were no more lessons that the District needed to impart to the graduates. In fact, the valedictorians' exceptional completion of the District's curriculum was why they had the opportunity to speak. A reasonable observer would understand that the relationship between the District and the valedictorians was over and would not associate the speakers' messages with the District's educational program. Consequently, the

circumstances which militated against applying *Tinker* in *Fraser* and *Kuhlmeier* are not apparent in this case. The Tenth Circuit's conclusion that *Kuhlmeier* is dispositive of Miss Corder's claims conflicts with this Court's reasoning in *Kuhlmeier* and undermines this Court's long-standing protection of students' First Amendment rights in *Tinker*. Miss Corder requests that this Court grant her petition to resolve the conflict.

II. THE TENTH CIRCUIT'S DETERMINATION THAT HIGH SCHOOL VALEDICTORY MESSAGES CONSTITUTE SCHOOL-SPONSORED SPEECH GOVERNED BY *KUHLMEIER* CONFLICTS WITH RULINGS IN OTHER CIRCUITS AND ITS OWN PRECEDENT.

The Tenth Circuit panel's conclusion that the valedictory speeches constitute school-sponsored speech also conflicts with decisions in the Fifth and Eleventh Circuits and its own precedent.

A. The Tenth Circuit's Determination That The Valedictory Speeches Are School-Sponsored Conflicts With Decisions In Other Circuits.

The panel's conclusion that Miss Corder's valedictory message is school-sponsored speech governed by *Kuhlmeier* creates an inter-circuit conflict with Fifth and Eleventh Circuit decisions addressing graduation speeches and student-initiated prayers at graduation. *Adler v. Duval County School Board*, 206 F.2d 1070 (11th Cir. 2000), *cert. granted*,

judgment vacated, 531 U.S. 801 (2000), *judgment reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc), *cert denied*, 534 U.S. 1065 (2001); *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) *cert granted, judgment vacated sub nom Chandler v. Siegelman*, 530 U.S. 1256 (2000), *judgment reinstated sub nom Chandler v. Siegelman*, 248 F.3d 1313 (11th Cir. 2001), *cert. denied* 533 U.S. 916 (2001); *Ingebretsen v. Jackson Public School Dist.* 88 F.3d 274 (5th Cir. 1996) *affirming in part Jones v. Clear Creek Indep. School Dist.* 977 F.2d 963 (5th Cir. 1992). In each of these decisions the courts found that student-initiated speeches, including prayers, at graduation did not bear the "imprimatur" of the school.

This Court has emphasized that "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day." *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000). Relying upon that statement,[1] the Eleventh Circuit upheld a policy that permitted graduating seniors to decide whether they were going to have a message and if so who would deliver it. *Adler*, 250 F.3d at 1330. As is true in this case, in *Adler* the students decided whether they were going to have a message, who was going to deliver the message and what the message would contain. 250 F.3d at 1332. The *Adler* court found that the student-initiated, student-drafted graduation messages were not school-sponsored speech. *Id.* at 1338. The Eleventh

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[1] In fact, the *Adler* court specifically reviewed the policy under *Santa Fe*, having received the case on remand from this Court after it issued the *Santa Fe* decision. *Adler*, 250 F.3d at 1332.

Circuit found that, unlike the policy this Court struck down in *Santa Fe*, the policy in *Adler* did not express a preference for prayer over other messages. *Id.* The Duval County policy did not contain any language approving an "invocation," nor any other provision that could fairly be read to require or approve a "religious" theme. *Id.* Therefore, it could not be seen to be "school-sponsored" speech subject to content-based regulations by the administration. *Id.*

In *Chandler*, the Eleventh Circuit held that "genuinely student-initiated religious speech is private speech endorsing religion" and is therefore "fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Chandler*, 180 F.3d at 1261. "The first principle must always be that genuinely student-initiated religious speech must be permitted. A student's individual decision to pray or otherwise speak religiously is not the State's command." *Id.* at 1264 (citing *Jones*, 977 F.2d at 965). "Such speech is fully protected." *Id.* The Fifth Circuit held that so long as school personnel do not participate in or actively supervise student-initiated speech, they cannot constitutionally prohibit students from speaking religiously. *Id.* at 1265.

In *Ingebretsen* the only portion of the Mississippi School Prayer Statute that the court upheld was the portion that permitted student-initiated voluntary prayer at graduation or commencement ceremonies. *Ingebretsen*, 88 F.3d at 280. The *Ingebretsen* court struck down the remainder of the statute as unconstitutional under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As to the graduation provision, the court said:

> We decline Ingebretsen's invitation to

> reconsider our holding in *Jones II* which allows students to choose to solemnize their graduation ceremonies with a student-initiated, non-proselytizing and nonsectarian prayer given by a student. 977 F.2d at 965 n. 1. To the extent the School Prayer Statute allows students to choose to pray at high school graduation to solemnize that once-in-a-lifetime event, we find it constitutionally sound under *Jones II*.

Ingebretsen, 88 F.3d at 280. While "benedictions or nonsectarian, nonproselytizing student-initiated voluntary prayer...during compulsory or noncompulsory school-related student assemblies, student sporting events...and other school related events" were regarded as school-sponsored, the same type of prayer during commencement was not. *Id.*

The Tenth Circuit's conclusion to the contrary in this case establishes a conflict that should be resolved by this Court. That conflict is particularly apparent in the Tenth Circuit's dismissal of the *Adler* case as distinguishable despite the substantial similarity in the facts. Notably, the Tenth Circuit used *Santa Fe* to justify its decision that Miss Corder's voluntary student prayer was sanctionable despite the language to the contrary relied upon in *Adler*.

In this case, as in *Adler*, *Chandler* and *Ingebretsen*, school officials did not direct what the messages would contain, who would give the messages, nor whether there would be messages at all. Instead, those decisions were made by the valedictorians. Those students were not "chosen" by school officials; the students earned the title of valedictorian

by excelling in their studies. District administrators might have established graduation requirements and developed grading criteria, but it was the students who met the criteria and earned the right to decide whether they would speak at commencement and what they would say. The appellate panel's determination that these student-directed messages constituted school-sponsored speech under *Kuhlmeier* conflicts with *Adler*, *Chandler* and *Ingebretsen* and should be reviewed by this Court.

B. The Appellate Panel's Determination That The Valedictory Speeches Are School-Sponsored Creates An Intra-Circuit Conflict Regarding The Definition Of School-Sponsored Speech.

The panel's decision in this case creates an intra-circuit conflict on the threshold issue of whether an activity is school-sponsored and governed by *Kuhlmeier* or private student speech governed by *Tinker*. Inherent in the panel's decision is the erroneous conclusion that the valedictory speeches in this case are substantially similar to the memorial tile project another Tenth Circuit panel found to be school-sponsored in *Fleming v. Jefferson County School District R-1*, 298 F.3d 918 (10th Cir. 2002). However, the two activities are significantly different. Separate panel decisions concluding that both activities bear the imprimatur of the school so as to be "school-sponsored" creates an intra-circuit conflict on an issue of significant importance – students' First Amendment rights on school campuses.

In *Fleming*, a Tenth Circuit panel found that a

memorial tile project at Columbine High School constituted school-sponsored speech under *Kuhlmeier*. *Fleming*, 298 F.3d at 925. The Columbine project consisted of the creation of memorial tiles that would be permanently affixed to a wall of the school, which was being reconstructed following the April 1999 tragedy. *Fleming*, 298 F.3d at 921. The appellate panel found that the tile project met the "imprimatur" concept in *Kuhlmeier*. "The imprimatur concept covers speech that is so closely connected to the school that it appears the school is somehow sponsoring the speech." *Fleming*, 298 F.3d at 925. "[E]xpressive activities that the school allows to be integrated permanently into the school environment and that students pass by during the school day come much closer to reasonably bearing the imprimatur of the school." *Id.* The tiles satisfied that definition because of their permanency–they were physically attached to the school building so that students would pass by them during the school day–and because the school paid for the memorial, supervised the creation of the tiles and selected the tiles that would be affixed to the wall. *Id.* at 925, 930.

By contrast, the valedictory speeches in this case were fleeting events – only thirty seconds each – that were created by the students who earned the opportunity to speak by excelling in their studies. The valedictorians, not school officials, chose who among them would speak and the general topics for the messages. (App., 3a). Unlike the messages on the tiles at Columbine High School, the valedictory messages given by Miss Corder and her co-valedictorians were not made permanent fixtures or otherwise memorialized so that passers-by would immediately think that school officials were presenting the message. Nevertheless, the appellate panel found that the speeches and memorial tiles were substantially

similar. The panel concluded that the District "exercised control" over the valedictory speeches because it "limited" the giving of speeches to the valedictorians, despite having earlier acknowledged that the valedictorians, not the District, determined whether any, some or all of them would speak at commencement. (App., 20a). The panel also found that the District controlled who "qualified" as a valedictorian, when the determination was based upon whether a student excelled in her studies. (App., 20a). The appellate panel also reasoned that the valedictory speeches were school-sponsored because a teacher escorted Miss Corder to see the assistant principal at the conclusion of the commencement ceremony. (App., 20a).

While claiming to follow the path established in *Fleming*, the appellate panel in fact diverged significantly from that precedent to create a broad definition of "school-sponsored" that conflicts with rather than follows from *Kuhlmeier*. The result is an intra-circuit conflict that should be resolved by this Court.

III. THE TENTH CIRCUIT'S DEFINITION OF LEGITIMATE PEDAGOGICAL CONCERNS CONFLICTS WITH THIS COURT'S PRECEDENTS.

The Tenth Circuit's broad definition of "legitimate pedagogical concerns" to extend beyond graduation conflicts with this Court's precedents limiting the extent of a school's authority to regulate student speech otherwise protected under *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969).

In *Fraser*, this Court found legitimate pedagogical concerns in prohibiting the use of vulgar speech and lewd conduct during a school assembly that was part of an educational program in self-government. *Bethel School Dist. v. Fraser*, 478 U.S. 675, 685 (1986). The event in *Fraser* was part of the school's educational program, and the student's speech was seen as undermining the school's educational mission. *Id.* Therefore, the school's actions were reasonably related to its educational goals of preparing students to engage in appropriate and civil public discourse. *Id.* at 681.

Kuhlmeier held that educators can exercise editorial control over student speech in school-sponsored activities if their actions are reasonably related to legitimate pedagogical concerns. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). This Court described legitimate pedagogical concerns as valid educational purposes and found that the principal's deletion of certain news articles from a school newspaper created as part of the journalism curriculum met the definition. *Id.* at 276. Since the newspaper was clearly a curricular activity, the school could exercise control to ensure that the educational goals of the journalism class were appropriately carried out. *Id.*

While this Court did not apply *Kuhlmeier* to reach its holding in *Morse*, it nevertheless followed *Kuhlmeier*'s and *Fraser*'s reasoning with regard to pedagogical concerns. *Morse v. Frederick*, 551 U.S. 393, 409 (2007). The *Morse* court found that part of the schools' job in educating students is to educate them about the dangers of using illegal drugs, which can impair the learning process and disrupt the learning environment. *Id.* at 408. Therefore, it is reasonable for districts to restrict speech that advocates illegal drug use. *Id.* The

Morse court noted that these concerns were serious and palpable, extending well beyond "an abstract desire to avoid controversy." *Id.* at 408-409.

In these and other school speech cases, this Court has consistently identified pedagogical concerns as tangible educational purposes attendant to an ongoing program of study. *See, e.g., Parents Involved in Community Schools v. Seattle School Dist.*, 551 U.S. 701, 726 (2007) (describing the pedagogical interest as the educational benefits of a diverse learning environment, but finding that the district had not satisfied the standard); *U.S. v. Virginia*, 518 U.S. 515, 549 (1996) (pedagogical concerns described as the educational benefits of single-sex education). School officials have been permitted to raise "legitimate pedagogical concerns" to justify actions taken against students who have not completed their educational requirements and, therefore are still under the authority of the district.

In this case, Miss Corder and her fellow co-valedictorians had completed their course of study. There were no more lessons to be learned, no educational purposes to be satisfied and no academic requirements left unfulfilled. The very reason that the valedictorians had the opportunity to speak was that they had completed the educational program so exceptionally that they were honored from among their peers. The only remaining interaction between the valedictorians and the District was for the District to present the graduates with diplomas memorializing what they had already completed.

Nevertheless, the Tenth Circuit determined that the District had a "legitimate pedagogical concern" that justified

disciplining Miss Corder for including a religious reference in her speech. (App., 20a). According to the appellate panel, the "pedagogical concept" set forth by this Court in *Kuhlmeier* "merely means related to learning" and can be satisfied "simply by the school district's desire to avoid controversy in the school environment." (App., 18a). Using that definition, the panel found that the District's policy of reviewing valedictory speeches prior to graduation is related to learning because a graduation ceremony is an opportunity for the District to impart lessons on discipline, courtesy and respect for authority. (App., 20a). The panel did not explain how that opportunity could be applied to Miss Corder, who had already completed her studies and therefore was no longer part of the student body subject to the District's pedagogical authority. The panel also did not explain how a legitimate pedagogical concern in pre-commencement review of valedictory speeches constitutes justification for post-commencement discipline in the form of withholding a valedictorian's diploma until she apologizes for including a religious reference in her speech.

The Tenth Circuit attempted to harmonize its broad definition of legitimate pedagogical concerns with *Kuhlmeier,* but its analysis and conclusion show that its holding directly contradicts the standards set forth in *Kuhlmeier* and *Fraser*. As authority for its proposition that the pedagogical test may be satisfied simply by a district's desire to avoid controversy in the school environment, the appellate panel cited the following language in *Kuhlmeier*, 484 U.S. at 272:

> A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or

> alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," *Fraser, supra*, at 683, or to associate the school with any position other than neutrality on matters of political controversy.

(App., 20a-21a). *Kuhlmeier* and *Fraser* do not sweep as broadly as the Tenth Circuit claims. Instead, those cases carefully define pedagogical concerns as matters integral to imparting the prescribed subject matter and to the orderly operation of the school. *Kuhlmeier*, 484 U.S. at 279; *Fraser*, 478 U.S. at 683. Furthermore, this Court specifically rejected the Tenth Circuit's definition when it said that mere incompatibility with a school's pedagogical message is not a constitutionally sufficient justification for suppression of student speech. *Kuhlmeier*, 484 U.S. at 279. This Court should accept review to resolve the conflict between the Tenth Circuit's view and this Court's precedents.

IV. THE TENTH CIRCUIT'S DEFINITION OF LEGITIMATE PEDAGOGICAL CONCERNS CONFLICTS WITH ITS OWN AND OTHER CIRCUITS' DECISIONS.

The appellate panel's determination that the District's actions against Miss Corder were reasonably related to legitimate pedagogical concerns contradicts the panel's decision in *Fleming v. Jefferson County School District*, 298 F.3d 918 (10th Cir. 2002) as well as decisions defining "legitimate pedagogical concerns" in other circuits.

A. The Panel's Determination That The District Satisfied The Definition Of Legitimate Pedagogical Concern Under *Kuhlmeier* Creates An Intra-Circuit Conflict.

Unlike the valedictory speeches at issue in ths case, the Columbine memorial tile project fit squarely into the definition of pedagogical–"the environment in which learning takes place, such as the school's hallways." *Fleming*, 298 F.3d at 931. In *Fleming*, the district had explicitly described the legitimate pedagogical concerns underlying the project:

> To assure that the interior of the building would remain a positive learning environment and not become a memorial to the tragedy, Ms. Monseu directed that there could be no references to the attack, to the date of the attack, April 20, 1999, or 4/20/93 [sic], no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive.

Id. at 921. Students returning to Columbine High School following the reconstruction would be completing their education within the walls upon which the memorial tiles were affixed. *Id.* at 931. What they viewed along those walls would directly affect the effectiveness of students' learning experience for years to come, *i.e.*, reflected a legitimate pedagogical concern. *Id.*

By contrast, in this case, the valedictory speeches were fleeting remarks which occurred at the end of the

valedictorians' learning experience. The valedictorians and other graduates had completed their instructional requirements, so there were no legitimate educational goals that the District could cite to justify disciplinary actions against student expression. Unlike the memorial tiles at Columbine High School, the thirty-second speeches would not become part of the learning environment that could affect whether students would be able to effectively meet educational standards. The District did not, as the district did in *Fleming*, explicitly lay out educational goals for the commencement ceremony. In other words, the valedictory speeches in this case bear none of the indicia of legitimate pedagogical concerns described in *Kuhlmeier* and *Fleming*. The appellate panel's contrary conclusion creates an intra-circuit conflict that should be resolved by this Court.

B. The Panel's Determination That The District Satisfied The Definition Of Legitimate Pedagogical Concern Under *Kuhlmeier* Conflicts With Definitions Of The Term In Other Circuits.

No other reported Circuit opinion has applied the concept of "legitimate pedagogical concerns" to graduation ceremonies and post-graduation conduct. The Tenth Circuit's expansion of the concept conflicts with other circuit cases' definition of the term since *Kuhlmeier*.

In a case analogous to *Fleming*, the Eleventh Circuit found legitimate pedagogical concerns in a district's decision to restrict the content of student-painted murals on the walls of the school. *Bannon v. School Dist. of Palm Beach Co.*, 387

F.3d 1208, 1214 (11th Cir. 2004). As was true in *Fleming*, in *Bannon* the artwork was to become part of the physical learning environment and the district established standards that were designed to foster effective learning and avoid disruption for students presently engaged in the educational process. *Id.* at 1220. The court found that the district's prohibition of the student's Christian message on the school's walls under those circumstances met the reasonable relationship test in *Kuhlmeier*. *Id.*

In *Curry v. Hensiner*, 513 F.3d 570, 578 (6th Cir. 2008), the Sixth Circuit followed this Court's analysis in *Kuhlmeier* to find legitimate pedagogical concerns in limiting projects in a "classroom city" to products that did not reflect or represent students' viewpoints on issues. The *Curry* court acknowledged that pedagogical concerns extend beyond academics to encompass other educational concepts such as teaching civility and following directions when incorporated into a curricular program. *Id.* A key factor in *Curry*, as in *Kuhlmeier*, was that the classroom city event was part of the ongoing learning processes over which the school exercised control, just as the newspaper was part of the ongoing journalism program over which the Hazelwood district exercised control. *Id.* In both contexts it was reasonable for school officials to exercise editorial control. *Id.* at 578-579; *Kuhlmeier*, 484 U.S. at 276. In this case, the Tenth Circuit adopted the concept that pedagogical concerns encompass more than academics, but failed to include the critical qualification that the interests be incorporated into a curricular program. That critical omission creates a gaping loophole in student free speech rights as it permits school officials to extend their reach beyond the time when their pedagogical interests come to an end.

The Sixth and Eighth Circuits have identified legitimate pedagogical concerns in teaching courtesy, decorum and propriety in the context of student government elections. *Poling v. Murphy*, 872 F.2d 757, 763-764 (6th Cir. 1989); *Henerey v. City of St. Charles, School Dist.*, 200 F.3d 1128, (8th Cir. 1999). In both cases, school officials disciplined current students for conduct that was disruptive to the ongoing learning environment. In *Poling*, the student made discourteous comments about a school administrator in order to get votes for his candidacy during a speech at a compulsory school assembly. *Poling*, 872 F.2d at 759. The Sixth Circuit found that the district's disqualification of his candidacy was reasonably related to legitimate pedagogical interests in teaching high school students the art of civil discourse. *Id.* at 763. In *Henerey*, the Eighth Circuit disqualified a student from student elections after he distributed condoms with his campaign slogan. *Henerey*, 200 F.3d at 1136. "School districts have an interest in maintaining decorum and in preventing the creation of an environment in which learning might be impeded, an interest that was particularly strong in the present case because the condom distribution occurred within the context of a school-sponsored election." *Id.* at 1135. Furthermore, the fact that the student distributed condoms raised concerns about the school exposing students to materials of a sexual nature without giving parents notice and the opportunity to consent. *Id.* at 1136. The court found that these concerns were sufficient to justify the district's actions. *Id.* As was true in *Curry*, the courts in these cases defined pedagogical concern as related to the ongoing learning environment for current students, not the perceived teachable moment for a graduate developed by the Tenth Circuit here.

In each of these cases, legitimate pedagogical concerns were defined in the context of upholding educational standards and maintaining an optimal learning environment in which those standards could be imparted to current students. None of those factors was present in the District's post-graduation actions that the Tenth Circuit determined could be considered pedagogical interests. The appellate panel attempted to fit a graduation ceremony into the pedagogical interest framework by offering a list of "learning opportunities" that the panel believed a graduation ceremony could afford, *i.e.,* imparting lessons on discipline, courtesy and respect for authority. (App., 20a). However, since the event was high school graduation, which occurs after the "imparting of lessons" has come to an end, these opportunities are not related to educational requirements or processes. Similarly, since the student expression was a thirty-second valedictory speech at the conclusion of the graduates' school career, there is no connection between the speeches and preserving an optimal learning environment for the students.

The Tenth Circuit's conclusion that the District satisfied the legitimate pedagogical concerns concept conflicts with how pedagogical concerns have been defined in *Kuhlmeier* and in subsequent decisions in other circuits. This Court should accept review to resolve the conflict.

V. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS PROTECTING CITIZENS' FIRST AMENDMENT RIGHTS TO BE FREE FROM COMPELLED SPEECH.

The Tenth Circuit employed its flawed analysis of this Court's student speech precedent in its analysis of Miss Corder's compelled speech claim to reach a conclusion that itself conflicts with this Court's precedents regarding compelled speech. The Tenth Circuit reasoned that since it concluded that the commencement ceremony was "school sponsored" and the District had "legitimate pedagogical concerns" sufficient to justify withholding Miss Corder's diploma, then it followed that the District was free to compel Miss Corder to apologize. (App, 24a). However, since the underlying premises that the commencement ceremony was school-sponsored and withholding the diploma was reasonably related to legitimate pedagogical concerns were incorrect, the conclusion regarding the forced apology is necessarily incorrect as well. Furthermore, the Tenth Circuit misapplied the "legitimate pedagogical concerns" concept from *Kuhlmeier* to circumstances under which the District no longer had any pedagogical concerns that could justify taking action against Miss Corder, particularly compelling her to apologize.

At the time that Miss Corder was compelled to speak, after graduation, she was no longer a student subject to the District's authority. She had completed her instructional program. Miss Corder had fulfilled all of her requirements for a high school diploma, and the only transaction remaining between Miss Corder and the District was the actual

presentation of the diploma itself. The Tenth Circuit acknowledged that "[t]he School District no longer has the power or the opportunity to adversely affect Corder's rights as they pertain to valedictory speeches" when it upheld the dismissal of Miss Corder's declaratory relief claim. (App., 10a). However, when it came to analyzing her compelled speech claim the appellate panel held that the District did have the power to adversely affect Miss Corder's rights as they pertain to valedictory speeches. (App., 51a). According to the panel, graduation ended the District's control over Miss Corder for purposes of ascribing liability, but did not end its control over her when it came to meting out punishment. The Tenth Circuit's amorphous definition of the District's authority does not comport with this Court's precedents limiting schools' authority over student speech and establishing the fundamental right to refrain from speaking.

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 631 (1943), this Court recognized that elementary-age students retain the right of freedom from compelled speech even in the classroom when it ruled that students could not be compelled to recite the Pledge of Allegiance. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. This Court later confirmed that "[t]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Riley v.*

National Federation of the Blind , 487 U.S. 781, 797 (1988) (quoting *Wooley*, 430 U.S. at 714)."The First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Id.* Taken together, *Wooley* and *Barnette* have "established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Acad. and Institutional Rights. Inc.*, 547 U.S. 47, 61 (2006). Under these precedents, Miss Corder had the right to refrain from making any statement related to her valedictory speech and could not be compelled to say what the District dictated she must say under threat of not receiving her diploma. As former Chief Justice Rehnquist succinctly stated, "Compulsion, after *Barnette*, is not permissible...." *Elk Grove Unified School Dist. v. Newdow* , 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring).

This Court's student speech precedents do not require a different conclusion. *Tinker* upheld students' rights to free speech even while under the school's authority, on campus and during the school day. *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969). *Fraser, Kuhlmeier* and *Morse* have permitted schools to impose some limitations on student free speech rights while under the authority of school officials. *Bethel School District v. Fraser*, 478 U.S. 675 (1986)(permitting disciplinary action against a lewd speech given during a school assembly); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (permitting restrictions on speech that is part of a class assignment); *Morse v. Frederick*, 551 U.S. 393 (2007)(permitting censorship of pro-drug speech during an extracurricular activity). However, they have not abrogated the general rule from *Tinker* that students "do not shed their constitutional

rights at the schoolhouse gate." *Tinker*, 393 U.S. at 506. These precedents illustrate that "we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864-865 (1982).

Therefore, even when current students engage in speech in a school setting during instructional time, school officials cannot stifle students' First Amendment rights under the guise of "legitimate pedagogical concerns." Furthermore, the courts cannot merely defer to educators' articulated pedagogical interests without examining whether the students' First Amendment rights were given due consideration. The Tenth Circuit did not engage in such an analysis. Instead, the appellate panel said that "[w]e give 'substantial deference' to 'educators' stated pedagogical concerns" and upheld the District's actions. (App., 24a, citing *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004)). The Tenth Circuit's cursory treatment of the compelled speech issue conflicts with this Court's precedents as to speech by current students while under the authority of school officials. Since this case involves graduates who are no longer under the authority of the District, the conflict is all the more egregious.

The Tenth Circuit's ruling that the District did not violate Miss Corder's First Amendment rights against compelled speech when it compelled her to issue an apology for referring to Jesus in her valedictory speech contradicts this Court's precedents. This Court should grant review to clarify that high school graduates' constitutional rights cannot be

infringed upon under the guise of "legitimate pedagogical concerns."

CONCLUSION

The Tenth Circuit's decision undermines this Court's long-standing protection of student free speech rights and creates a deferential standard that will all but erase any vestiges of free speech on secondary school campuses. The Tenth Circuit's expansion of the concepts of "school-sponsored" speech and "legitimate pedagogical concerns" conflicts with this Court's precedents, its own decisions in other cases and decisions by other Circuits.

For these reasons, Miss Corder respectfully requests that this Court grant her Petition.

Dated: August 27, 2009.

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APPENDIX

APPENDIX A

May 29, 2009.

PUBLISH

UNITED STATES COURT OF APPEALS,

TENTH CIRCUIT.

No. 08-1293

Erica CORDER,
Plaintiff-Appellant,
v.
LEWIS PALMER SCHOOL
DISTRICT NO. 38,
Defendant-Appellee.

The National Legal
Foundation, Amicus Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 1:07-CV-1798-WDM MJW)

Stephen M. Crampton (Mary E. McAlister, Liberty Counsel,

Lynchburg, VA; Mathew D. Staver, Liberty Counsel, Maitland, FL, with him on the briefs), of Liberty Counsel, Lynchburg, VA, for Plaintiff-Appellant.

W. Stuart Stuller of Caplan and Earnest LLC, Boulder, CO (Kristin C. Edgar with him on the brief), for Defendant-Appellee.

Steven W. Fitschen, Virginia Beach, VA, (Douglas E. Myers with him on the brief), filed an amicus curiae brief for The National Legal Foundation.

Before BRISCOE, SEYMOUR, and LUCERO, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiff-Appellant Erica Corder appeals the grant of Defendant-Appellee Lewis Palmer School District No. 38's ("School District") Fed.R.Civ.P. 12(c) motion for judgment on the pleadings. Corder brought claims under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Colo.Rev.Stat. § 22-1-120, stemming from the School District's response to Corder's valedictory speech at her high school graduation.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm the district court.

I

Corder was a student at Lewis Palmer High School and one of fifteen students named as class valedictorian for her 2006 graduating class. In most previous years, the valedictorians were each permitted to give a short speech at the school's graduation ceremony. Prior to Corder's graduation ceremony, the school principal informed the valedictorians that they could decide whether all of the fifteen valedictorians, or a subset thereof, would deliver the valedictory message. The valedictorians decided that each of them would speak for approximately thirty seconds, and they decided on a general topic for the speeches. However, before a valedictorian would be allowed to present his or her speech at graduation, the principal required each valedictorian to present his or her speech to him for his review of the speech's content. The principal did not provide any further instruction concerning the conduct or content of the speeches.

The School District has a written policy governing student expression which prohibits a variety of types of speech such as slander and profanity, as well as speech that "[t]ends to create hostility or otherwise disrupt the orderly operation of the educational process." Aplt.App. at 11, ¶ 26. The policy makes no reference to religious speech. Further, the written policy does not require students to submit their proposed expression for review or approval. Application of the School District's written policy governing student expression is not at issue in this case, but rather Corder challenges the School District's unwritten policy of requiring students to submit their valedictory speeches for content review prior to presentation.

As required, Corder presented her speech to the school principal for his review prior to the graduation ceremony. The speech she gave to the principal for review did not mention religion. At the graduation ceremony, however, Corder gave a different speech. This is the speech she gave:

> Throughout these lessons our teachers, parents, and let's not forget our peers have supported and encouraged us along the way. Thank you all for the past four amazing years. Because of your love and devotion to our success, we have all learned how to endure change and remain strong individuals. We are all capable of standing firm and expressing our own beliefs, which is why I need to tell you about someone who loves you more than you could ever imagine. He died for you on a cross over 2,000 years ago, yet was resurrected and is living today in heaven. His name is Jesus Christ. If you don't already know Him personally I encourage you to find out more about the sacrifice He made for you so that you now have the opportunity to live in eternity with Him. And we also encourage you, now that we are all ready to encounter the biggest change in our lives thus far, the transition from childhood to adulthood, to leave Lewis-Palmer with confidence and integrity. Congratulations class of 2006.

Id. at 11-12, ¶ 30. At the conclusion of the graduation ceremony, Corder was escorted to see the assistant principal. The assistant principal told Corder that she would not receive

her diploma and that she had to make an appointment to see the principal.

Corder and her parents met with the principal five days later. Corder understood from the principal that she would not receive her diploma unless she publicly apologized for her valedictory speech. Corder did not apologize for the content of her speech, but prepared a written statement explaining that her statement reflected her own personal beliefs and was made without the principal's prior approval. The draft submitted by Corder is as follows:

> At graduation, I know some of you may have been offended by what I said during the valedictorian speech. I did not intend to offend anyone. I also want to make it clear that [the principal] did not condone nor was he aware of my plans before giving the speech. I'm sorry I didn't share my plans with [the principal] or the other valedictorians ahead of time. The valedictorians were not aware of what I was going to say. These were my personal beliefs and may not necessarily reflect the beliefs of the other valedictorians or the school staff.

Id. at 13, ¶ 43. The principal required Corder to insert the following sentence into the statement: "I realize that, had I asked ahead of time, I would not have been allowed to say what I did." *Id.* at 13-14, ¶ 44. Corder agreed to include the sentence because the principal said he would not give Corder her diploma unless she added the sentence. Corder's statement was distributed via e-mail, and Corder received her diploma.

Corder filed suit, asserting the following claims: (1) violation of freedom of speech under the First Amendment; (2) compelled speech in violation of the First Amendment; (3) violation of the right to equal protection under the Fourteenth Amendment; (4) violation of freedom of religion under the First Amendment; (5) violation of Colo.Rev.Stat. § 22-1-120; and (6) violation of the Establishment Clause of the First Amendment.[1] Corder sought nominal damages and injunctive relief. After the School District filed a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(b)(1) and (c) and the parties conducted limited discovery and then filed cross-motions for summary judgment, the district court

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[1] Corder does not continue to pursue her Establishment Clause claim on appeal. An appellant's opening brief must identify "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R.App. P. 28(a)(9)(a). "Consistent with this requirement, we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir.2007).
Corder's brief on appeal does not argue the Establishment Clause claim and only mentions the Establishment Clause when urging reversal of the district court's grant of summary judgment on Corder's claim under Colo.Rev.Stat. § 22-1-120. Interestingly, Corder submitted supplemental authorities, pursuant to Fed. R.App. P. 28(j), which were Establishment Clause cases, but which Corder claimed were pertinent to other issues on appeal. We considered these cases, as well as a Fed. R.App. P. 28(j) case submitted by the School District, but do not find them relevant to our analysis of Corder's appeal.

granted the School District's motion for judgment on the pleadings.

II
Standard of Review

We review a dismissal granted under Fed.R.Civ.P. 12(c)"under the standard of review applicable to a Rule 12(b)(6) motion to dismiss." *Nelson v. State Farm Mut. Auto. Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir.2005) (internal quotations omitted). "This court reviews de novo the district court's grant of a motion to dismiss pursuant to Rule 12(b)(6), applying the same legal standard applicable in the district court." *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir.2007). "In reviewing a motion to dismiss, this court must look for plausibility in the complaint." *Id.* (internal quotations omitted). "Under this standard, a complaint must include 'enough facts to state a claim to relief that is plausible on its face.' "*Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)). "The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." [2] *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th

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[2] Corder argues that the district court committed reversible error by referring to matters outside her complaint in its order on the School District's Rule 12(c) motion. *See GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir.1997) ("The failure to convert a 12(b)(6) motion to one for summary judgment where a court does not exclude outside materials is reversible error unless the dismissal can be justified without considering the outside materials."). It is not evident that the district court referred to

Cir.2008).

Mootness

In addition to a request for nominal damages, Corder's complaint seeks a declaration that the School District violated Corder's First Amendment and Equal Protection rights, and a declaration that the School District's unwritten policy of reviewing student graduation speeches is unconstitutional. Corder's complaint also seeks a permanent injunction against enforcement of that unwritten policy.[3] The School District argued before the district court that Corder's claims for declaratory and injunctive relief are moot, and the district court agreed.[4]

Although we have jurisdiction over appeals from all final decisions of federal district courts, 28 U.S.C. § 1291, we

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matters outside Corder's complaint, but rather merely made inferences from the facts alleged in Corder's complaint. *See Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir.2008) ("The court must view all reasonable inferences in favor of the plaintiff, and the pleadings must be liberally construed."(internal quotations omitted)). Regardless, because we affirm the district court's dismissal without reference to outside materials, we need not further address Corder's claim of procedural error.

[3] At oral argument, Corder's counsel clarified that Corder is no longer seeking injunctive relief, but continues to pursue her claims for nominal damages and declaratory relief.

[4] The School District did not assert mootness against Corder's claim for nominal damages.

have no subject matter jurisdiction over a case if it is moot. *Unified Sch. Dist. No. 259, Sedgwick County, Kan. v. Disability Rights Ctr. of Kan.*, 491 F.3d 1143, 1146-47 (10th Cir.2007). "Constitutional mootness doctrine is grounded in the Article III requirement that federal courts may only decide actual, ongoing cases or controversies." *Seneca-Cayuga Tribe v. Nat'l Indian Gaming Comm'n,* 327 F.3d 1019, 1028 (10th Cir.2003) (internal quotations and alteration omitted). "It is well established that what makes a declaratory judgment action a proper judicial resolution of a case or controversy rather than an advisory opinion-is the settling of some dispute which affects the behavior of the defendant toward the plaintiff. Hence, this court has explained that a plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured by the defendant in the future." *Green v. Branson,* 108 F.3d 1296, 1299-1300 (10th Cir.1997) (internal quotations, citations and alterations omitted). We review de novo the question of whether a case is moot. *Prier v. Steed,* 456 F.3d 1209, 1212 (10th Cir.2006).

"We have previously held that 'when an individual graduates from school there no longer exists a live controversy necessary to support an action to participate in interscholastic activity.' "*Lane v. Simon,* 495 F.3d 1182, 1186 (10th Cir.2007) (quoting *Bauchman v. W. High Sch.*, 132 F.3d 542, 548 (10th Cir.1997)). In *Bauchman,* a Jewish high school student challenged her choir instructor's alleged advocacy of Mormonism during classes and choir performances, but graduated from high school while the case was pending on appeal. 132 F.3d at 546. After determining that the defendant school officials "no longer ha[d] the power or opportunity to adversely affect Ms. Bauchman's constitutional rights," we

dismissed her declaratory and injunctive relief claims as moot. *Id.* at 548; *see also Fischbach v. N.M. Activities Ass'n,* 38 F.3d 1159, 1160 (10th Cir.1994) (holding that due to student plaintiff's graduation, "the power of the [defendant state activities association] to adversely affect his rights ha[d] ended" and the case was moot). In *Lane,* the plaintiffs were the student editors of a college newspaper, who claimed that the school had impinged on their exercise of freedom of the press. We similarly held that because the plaintiffs had graduated and no longer served on the board of the student newspaper, the plaintiffs' claims for declaratory and injunctive relief were moot. *Lane,* 495 F.3d at 1186-87.

Here, Corder complains that the School District's unwritten policy for requiring prior approval of graduation speeches impinges on her rights under the First Amendment and the Equal Protection Clause. Corder, however, graduated from high school in 2006 and is no longer a student under the School District's control. She will never again be subject to the unwritten policies of the School District requiring prior content review of valedictory speeches. The School District no longer has the power or the opportunity to adversely affect Corder's rights as they pertain to valedictory speeches. As a result, Corder's demands for declaratory and injunctive relief are moot.

An exception to the mootness doctrine exists for cases that are "capable of repetition, yet evading review." *Murphy v. Hunt,* 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) (internal quotations omitted). But this exception applies only when: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [i]s a reasonable expectation that the

same complaining party w [ill] be subjected to the same action again." *Id.* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975)).

Although Corder's claims arguably meet the first prong of this test, she fails to satisfy the second prong of the exception. Because only graduating seniors would fall within the unwritten policy of which Corder complains, there is no reasonable expectation that Corder will be subjected, post-graduation, to prior review of the content of a graduation speech in accordance with the School District's unwritten policy. Thus, Corder's claims for declaratory and injunctive relief do not fall within the exception to the mootness doctrine. Only Corder's claim for nominal damages for the violation of her constitutional rights remains for our review.

First Amendment Free Speech Claim

The First Amendment's free speech clause states that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. As regards the treatment of a student's exercise of First Amendment free speech rights at school, two approaches have emerged: the approach in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), and the approach in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). The parties dispute which case is our proper guide for determining the appropriate classification of Corder's valedictory speech given at the graduation ceremony.

We begin by noting that the Supreme Court cases make clear that students do not "shed their constitutional

rights to freedom of speech or expression at the schoolhouse gate." *Tinker,* 393 U.S. at 506, 89 S.Ct. 733. At the same time, the Court has held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"*Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), and that the rights of students "must be 'applied in light of the special characteristics of the school environment.' "*Hazelwood,* 484 U.S. at 266, 108 S.Ct. 562 (quoting *Tinker,* 393 U.S. at 506, 89 S.Ct. 733).

In *Tinker,* the Court specified that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." 393 U.S. at 506, 89 S.Ct. 733. *Tinker* involved a group of high school students who planned to wear black armbands to protest the Vietnam War. *Id.* at 504, 89 S.Ct. 733. School officials learned of the plan and responded by adopting a policy prohibiting students from wearing armbands. *Id.* When several students nonetheless wore armbands to school, they were suspended. *Id.* The students sued, claiming that their First Amendment rights had been violated, and the Court agreed. *Id.* at 505-06, 89 S.Ct. 733.

Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513, 89 S.Ct. 733. The only interest the Supreme Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Id.* at 509, 510, 89 S.Ct.

733. That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id.* at 508, 89 S.Ct. 733.

The Court again addressed student speech in *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). In that case, a student was suspended for delivering a speech before a high school assembly in which he employed what the Court called "an elaborate, graphic, and explicit sexual metaphor." *Id.* at 678, 106 S.Ct. 3159. Analyzing the case under *Tinker,* the district court and court of appeals found no disruption, and therefore no basis for disciplining the student. *Id.* at 679-80, 106 S.Ct. 3159. The Supreme Court reversed, holding that the "School District acted entirely within its permissible authority in imposing sanctions upon [the student] in response to his offensively lewd and indecent speech." *Id.* at 685, 106 S.Ct. 3159.

The mode of analysis employed in *Fraser* is not entirely clear. The Court reasoned, however, that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate." *Id.* at 683, 106 S.Ct. 3159. *Cf. id.* at 689, 106 S.Ct. 3159 (Brennan, J., concurring in judgment) ("In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate [the student's] speech because they disagreed with the views he sought to express.").

We can distill two basic principles from *Fraser.* "First, *Fraser*'s holding demonstrates that 'the constitutional

rights of students in public school are not automatically coextensive with the rights of adults in other settings.' "*Morse v. Frederick,* 551 U.S. 393, 127 S.Ct. 2618, 2626, 168 L.Ed.2d 290 (2007) (quoting *Fraser,*478 U.S. at 682, 106 S.Ct. 3159). Had the student in *Fraser*"delivered the same speech in a public forum outside the school context, it would have been protected." *Id.*"In school, however, [the student's] First Amendment rights were circumscribed 'in light of the special characteristics of the school environment.' "*Id.* at 2626-27 (quoting *Tinker,* 393 U.S. at 506, 89 S.Ct. 733). "Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker.*" *Id.* at 2627. *See Hazelwood,* 484 U.S. at 271 n. 4, 108 S.Ct. 562 (disagreeing with the proposition that there is "no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser,*" and noting that the holding in *Fraser* was not based on any showing of substantial disruption).

The Supreme Court next addressed student speech in *Hazelwood,* a case that centered on "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." 484 U.S. at 271, 108 S.Ct. 562. Staff members of a high school newspaper sued their school when it chose not to publish two of their articles. *Id.* at 263-64, 108 S.Ct. 562. The court of appeals analyzed the case under *Tinker,* ruling in favor of the students "because it found no evidence of material disruption to class work or school discipline." *Morse,* 127 S.Ct. at 2627. The Supreme Court reversed, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in

school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood,* 484 U.S. at 273, 108 S.Ct. 562.

The *Hazelwood* Court made an exception to *Tinker* for school-sponsored speech. The Court characterized newspapers and similar school-sponsored activities "as part of the school curriculum" and held that "[e]ducators are entitled to exercise greater control over" these forms of student expression. *Id.* at 271, 108 S.Ct. 562. Accordingly, the Court expressly refused to apply *Tinker*'s standard. *Id.* at 272-73, 108 S.Ct. 562. Instead, for school-sponsored activities, the Court created a new standard that permitted school regulation of student speech that is "reasonably related to legitimate pedagogical concerns." *Id.* at 273, 108 S.Ct. 562. The Court stated:

> The question whether the First Amendment requires a school to tolerate particular student speech-the question that we addressed in *Tinker*-is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may

> fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Id. at 270-71, 108 S.Ct. 562.

And finally, in the Supreme Court's most recent student speech case, *Morse*, the Court affirmed that "schools may regulate some speech even though the government could not censor similar speech outside the school" and that the rule stated in *Tinker* "is not the only basis for restricting student speech." 127 S.Ct. at 2627 (internal quotations omitted). In *Morse*, a high school student "unfurled a 14-foot banner bearing the phrase 'BONG HITS 4 JESUS' during a school-sanctioned and supervised event." *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir.2007) (citing *Morse*, 127 S.Ct. at 2622). "The principal confiscated the banner and suspended [the student]." *Id.* The student "filed suit under 42 U.S.C. § 1983 against the principal and the School Board, claiming that the principal's actions violated his First Amendment rights." *Id.* at 769.

The *Morse* decision "resulted in a narrow holding: a public school may prohibit student speech at school or at a school-sponsored event during school hours that the school 'reasonably view[s] as promoting illegal drug use.' " *Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir.2008) (quoting *Morse*, 127 S.Ct. at 2629). Justice Alito's concurrence stated that he joined the majority opinion "on the understanding that (a) it goes no further than to hold that a public school may restrict

speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." *Morse,* 127 S.Ct. at 2636 (Alito, J., concurring). Justice Alito also made clear that he joined the majority only insofar as "the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions" beyond those articulated in the Supreme Court's prior student speech cases. *Id.* at 2637.

In *Fleming v. Jefferson County School District R-1,* 298 F.3d 918 (10th Cir.2002), this court addressed student speech and held that a Columbine High School project that involved the painting of four-inch-by-four-inch memorial tiles that would be permanently affixed to the school's hallways constituted "school-sponsored speech" under *Hazelwood.* 298 F.3d at 920-21, 924. We stated that "[t]he imprimatur concept covers speech that is so closely connected to the school that it appears the school is somehow sponsoring the speech" and derives from such factors as the level of involvement of school officials in organizing and supervising the event. *Id.* at 925.

We held that in order to determine whether challenged speech is school-sponsored and bears the imprimatur of the school, a reviewing court should appraise the level of involvement the school had in organizing or supervising the contested speech, and noted that certain expressive activities may be closely tied to a school, yet not school-sponsored speech bearing the school's imprimatur. *Id.* Such activities might include those sponsored by outside organizations who happen to use school facilities after school hours. *Id.* We

concluded that the memorial tiles project-permitting residents to design tiles for school walls-was school-sponsored speech bearing the imprimatur of the school because it was supervised by school officials and the tiles would be permanently affixed to the school's walls. *Id.* at 930-31.

We then stated that the "pedagogical" concept set forth in *Hazelwood* merely means that the activity is "related to learning." *Id.* at 925. We noted that "[t]he universe of legitimate pedagogical concerns is by no means confined to the academic for it includes discipline, courtesy, and respect for authority." *Id.* (internal quotations and alterations omitted). We also noted that several other courts have established that the pedagogical test may be satisfied "simply by the school district's desire to avoid controversy within a school environment." *Id.* at 925-26 (listing cases).

As we concluded in *Fleming,* we conclude here that this case is governed by the *Hazelwood* standard for school-sponsored speech.[5] We resolve this case by first

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[5] Corder relies on an Eleventh Circuit Establishment Clause case, *Adler v. Duval County School Board,* 250 F.3d 1330 (11th Cir.2001), for the argument that we should apply the holding of *Tinker* and conclude that her speech was private speech that happened to occur on school premises. In *Adler,* the Eleventh Circuit found that the student speech at graduation was private speech. *Id.* at 1336-37. However, the student speech at issue was from a student not chosen by the school and over whom the school exercised no editorial control. *Id.* at 1332. The school's written policy expressly provided that the purpose of the policy of having the students choose a student speaker was to allow selected students to

asking: is the "expressive activity" at issue-a valedictory speech at graduation-a "school-sponsored ... expressive activit[y] that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school"? *Hazelwood,* 484 U.S. at 271, 108 S.Ct. 562. If so, then a valedictory speech at graduation is school-sponsored speech, and the School District did not violate the "First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273, 108 S.Ct. 562.

The first prong of our analysis is easy to satisfy. Corder spoke as one of fifteen valedictory speakers at her high school's graduation ceremony. Although her speech did not occur in a traditional classroom setting, the graduation ceremony was supervised by the school's faculty and was clearly a school-sponsored event: Corder's complaint states that she "qualified" as a valedictorian, Aplt.App. at 9, ¶ 14, that the valedictorians were instructed by the principal on how

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speak "without monitoring or review by school officials." *Id.*
(continued)
Adler is distinguishable from the present case in two respects: the school policy at issue, and the entity selecting the student speaker. Corder acknowledges she was chosen by the school as a valedictorian based on her 4.0 grade point average and that her valedictory speech was governed by an unwritten policy requiring submission of graduation speeches for prior review.

to organize their speech, *id.* at 9, ¶ 16, that the principal required the valedictorians to submit their speeches to him for review for content, *id.* at 11, ¶¶ 27-28, and that Corder was "escorted by a teacher" to see the assistant principal after the conclusion of the graduation ceremony, *id.* at 12, ¶ 31. The school limited the giving of speeches to the valedictorians, who were chosen because of their 4.0 grade point average. A high school graduation ceremony under these circumstances is "so closely connected to the school that it appears the school is somehow sponsoring the speech." *Fleming,* 298 F.3d at 925. As a result, on these facts-where the School District exercised control over valedictory speeches in advance of graduation, and named valedictory speakers based on the School District's qualifications, the School District was entitled to exercise editorial control over Corder's speech as long as its action was reasonably related to pedagogical concerns.

The second prong of our analysis is also satisfied. The School District's policy of reviewing valedictory speeches prior to the graduation ceremony is related to learning. The giving of a speech in a community graduation ceremony certainly is a learning opportunity. A graduation ceremony is an opportunity for the School District to impart lessons on discipline, courtesy, and respect for authority. *Id.* ("The universe of legitimate pedagogical concerns is by no means confined to the academic for it includes discipline, courtesy, and respect for authority."). And, a School District is entitled to review the content of speeches in an effort to preserve neutrality on matters of controversy within a school environment. *See Hazelwood,* 484 U.S. at 272, 108 S.Ct. 562 ("A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate

drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order,'... or to associate the school with any position other than neutrality on matters of political controversy."(quoting *Fraser*, 478 U.S. at 683, 106 S.Ct. 3159)); *Fleming*, 298 F.3d at 925-26 (noting that several other courts have established that the pedagogical test may be satisfied "simply by the school district's desire to avoid controversy within a school environment"). As a result, the School District's unwritten policy of reviewing valedictory speeches prior to the graduation ceremony was reasonably related to pedagogical concerns.

We cannot conclude that the "First Amendment require[d][the] school affirmatively to promote" Corder's speech. *Hazelwood*, 484 U.S. at 270-71, 108 S.Ct. 562. We conclude that the School District did not violate Corder's First Amendment free speech rights by requiring the review of the content of her speech prior to its presentation.

First Amendment Compelled Speech Claim

Corder next argues that the School District's requirement that she submit a written apology for circulation as a condition to receiving her diploma violated her First Amendment right to refrain from speaking.[6] The Supreme

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[6] Amicus National Legal Foundation argues the district court erred in dismissing Corder s compelled speech claim because "it failed to analyze that claim under the unconstitutional conditions doctrine." Amicus Br. at 1; *see KT & G Corp. v. Att'y Gen. of Okla.*, 535 F.3d 1114, 1136 (10th Cir.2008) ("[T]he focus of the unconstitutional conditions doctrine is on

Court has long held that the First Amendment's freedom of speech guarantee "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006).[7] In addition, "compelled statements

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whether a governmental entity is denying a benefit to [a plaintiff] that [the plaintiff] could obtain by giving up [his or her] freedom of speech, or is penalizing [the plaintiff] for refusing to give up [his or her] First Amendment rights."(internal quotations omitted)). Amicus and all parties acknowledge, however, that this argument was not made to the district court, and we will therefore not consider it. *See Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir.1997) (concluding that a circuit court should exercise its discretion to reach an issue raised only by amicus curiae "only in exceptional circumstances").

[7] In earlier Supreme Court compelled speech cases, the Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in *Wooley v. Maynard*, 430 U.S. 705, 717, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) the Court held unconstitutional a state law that required New Hampshire motorists to display the state motto-"Live Free or Die"-on their license plates. In *Riley v. National Federation of the Blind*, 487 U.S. 781, 796-97, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), a case regarding charitable organizations' rights to not include certain facts while soliciting funds, the Court noted that "in the context of protected speech ... the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both

of fact ... like compelled statements of opinion, are subject to First Amendment scrutiny." *Id.* at 62, 126 S.Ct. 1297.

"In order to compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is regulatory, proscriptive, or compulsory in nature." *Axson-Flynn v. Johnson,* 356 F.3d 1277, 1290 (10th Cir.2004) (internal quotations omitted); *see also Bauchman,* 132 F.3d at 557 (noting that "compulsion" is a "threshold element" of a First Amendment compelled speech claim). All parties agree: Corder was compelled to apologize for evading the principal's instructions regarding the prior review of her speech and for any offense her actions may have caused the audience.

The Supreme Court has long recognized that, for purposes of the First Amendment, forced speech is no different than censored speech. *See Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 256, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (noting that the challenged statute, which compelled newspapers publishing attacks on political candidates to devote equal space to replies to those attacks, "operate[d] as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter"); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 796-97, 108 S.Ct. 2667, 101 L.Ed.2d 669 ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising

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what to say and what *not* to say."

the decision of both what to say and what *not* to say."). Thus, if the School District may censor Corder because her speech is school-sponsored rather than private, then so may the School District tell her what to say when she disregards the School District's policy regarding the school-sponsored speech, as long as the compulsion is related to a legitimate pedagogical purpose. *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178 (3d Cir.2005) ("School-sponsored speech may be restricted for legitimate pedagogical purposes, and it seems clear that a school may compel some speech for such purposes."(internal citation omitted)); *see also id.* at 186 ("Before exploring the contours of the First Amendment's protection of the right 'to refrain from speaking at all,' it must be recognized that this particular right is necessarily different in the public school setting.").

We have already concluded that Corder's presentation of a valedictory speech at her school's graduation ceremony involved school-sponsored speech. This conclusion also applies to Corder's forced apology. The imprimatur concept is satisfied because Corder's apology was directly related to her school-sponsored speech at the high school graduation. It occurred close in time after that graduation ceremony, and was disseminated through the principal's office via e-mail to the entire Lewis-Palmer school community. As a result, the School District was free to compel Corder's speech as long as the School District's "decision was 'reasonably related to legitimate pedagogical concerns.' "*Axson-Flynn*, 356 F.3d at 1290 (quoting *Fleming*, 298 F.3d at 926). "We give 'substantial deference' to 'educators' stated pedagogical concerns.' " *Id.* (quoting *Fleming*, 298 F.3d at 925).

Corder's forced apology is also reasonably related to

the School District's pedagogical concerns. The school-sponsored speech cases emphasize the discretion school officials have to ensure that "the views of the individual speaker are not erroneously attributed to the school." *Hazelwood*, 484 U.S. at 271, 108 S.Ct. 562; *see also Fraser*, 478 U.S. at 681-83, 106 S.Ct. 3159 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.... Indeed, the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the schools. The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."(internal quotations and citations omitted)).

The School District's requirement that Corder apologize for her behavior is "related to learning." *Fleming*, 298 F.3d at 925. As we stated in *Fleming*, the "universe of legitimate pedagogical concerns is by no means confined to the academic for it includes *discipline*, courtesy, and respect for authority." *Id.* (internal quotations and alterations omitted) (emphasis added). The discipline chosen by the School District for Corder's giving a speech different from the one she submitted for review was to require her to write an apology before she could receive her diploma. This disciplinary action, taken in response to Corder's violation of the review policy, was certainly reasonable. "[T]he *Hazelwood* standard ...'does not require that the [restrictions]

be the most reasonable or the only reasonable limitations, only that they be reasonable.' "*Axson-Flynn*, 356 F.3d at 1292 (quoting *Fleming*, 298 F.3d at 932); *see also Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir.2001) (concluding there is no constitutional violation for requiring a student to issue an apology as a condition of continuing on a sports team after the student circulated an insubordinate letter; "[i]t is well within the parameters of school officials' authority ... to teach civility and sensitivity in the expression of opinions").

We conclude that the School District did not violate Corder's First Amendment free speech rights by compelling her to e-mail an apology prior to receipt of her high school diploma.

First Amendment Freedom of Religion ("Free Exercise") Claim

Corder claims that the School District "substantially burdened" her sincerely held religious beliefs in violation of the Free Exercise Clause of the First Amendment when it disciplined her for her valedictory speech. The First Amendment states that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. amend. I. "While the First Amendment provides absolute protection to religious thoughts and beliefs, the [F]ree [E]xercise [C]lause does not prohibit governments from validly regulating religious conduct." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir.2006) (citing *Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed. 244 (1878)).

"Neutral rules of general applicability normally do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief." *Id.* (citing *Employment Div. v. Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (stating that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (internal quotation omitted))). "Thus, a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Id.* "On the other hand, if a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling governmental interest." *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)). Therefore, our first step in analyzing Corder's free exercise claim is to determine "which level of scrutiny to apply." *Id.; see e.g., Axson-Flynn,* 356 F.3d at 1294 ("Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review."(internal quotation omitted)).

"A law is neutral so long as its object is something other than the infringement or restriction of religious practices." *Grace United Methodist Church,* 451 F.3d at 649-50 (citing *Church of the Lukumi Babalu Aye, Inc.,* 508 U.S. at 533, 113 S.Ct. 2217 (a "law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context")). It is clear from

the facts Corder has alleged in her complaint that Corder was only required to follow the same religion-neutral policies as the other valedictorians. She was disciplined for her speech because she did not follow the religion-neutral policy of submitting her speech for prior review. Simply because Corder's valedictory speech happened to mention her religious views does not support the allegation that she was disciplined for her religious views. Corder's complaint does not permit this inference, when the facts of her complaint state she was the sole valedictorian that did not follow the rules and therefore the sole valedictorian that was disciplined. "Neutral rules of general applicability ordinarily do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief." *Axson-Flynn,* 356 F.3d at 1294.

We conclude that the School District did not violate Corder's First Amendment free exercise of religion rights by disciplining her for presenting a different valedictory speech than the one she gave to her principal for prior review.

Fourteenth Amendment Equal Protection Claim

Corder also maintains the district court erred in ruling that the School District did not violate the equal protection clause. The Fourteenth Amendment's Equal Protection Clause states that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. According to Corder, she was treated differently and more onerously than the other valedictorian speakers because the School District "allowed similarly situated speakers to give inspiring speeches without facing disciplinary action, but disciplined [Corder] because her inspiring speech contained religious elements." Aplt. Br. at

35.

Equal protection "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). The problem with Corder's claim lies in this fundamental precursor: similarity. Simply because she alleges that all valedictory speakers gave "inspirational" speeches does not mean that all valedictory speakers were similarly situated. The crux of the dispute between Corder and the School District is that Corder gave a speech at graduation that was different from the speech she submitted for review to the principal prior to graduation. She cannot merely include the conclusory allegation that all valedictorians were "similarly situated," when the remainder of her recitation of the facts indicates otherwise. The district court correctly ruled for the School District on Corder's equal protection claim by concluding Corder was not similarly situated to the other valedictory speakers.

In any event, because Corder does not contend she is either a member of a suspect class or was denied a fundamental right, the School District's disciplinary response after her graduation speech need only be rationally related to a legitimate government purpose to pass muster under the equal protection clause. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1213 (10th Cir.2002). As we have discussed throughout, the School District had reasonable, legitimate pedagogical purposes for disciplining Corder.

Colorado State Law Claim

Finally, Corder claims the district court erred when it

determined that her claim under Colo.Rev.Stat. § 22-1-120 failed because section 22-1-120 applied only to "publications." The statute states, in its entirety:

> (1) The general assembly declares that students of the public schools shall have the right to exercise freedom of speech and of the press, and no expression contained in a student publication, whether or not such publication is school-sponsored, shall be subject to prior restraint except for the types of expression described in subsection (3) of this section. This section shall not prevent the advisor from encouraging expression which is consistent with high standards of English and journalism.
>
> (2) If a publication written substantially by students is made generally available throughout a public school, it shall be a public forum for students of such school.
>
> (3) Nothing in this section shall be interpreted to authorize the publication or distribution in any media by students of the following:
>
> > (a) Expression that is obscene;
> >
> > (b) Expression that is libelous, slanderous, or defamatory under state law;
> >
> > (c) Expression that is false as

to any person who is not a public figure or involved in a matter of public concern; or

(d) Expression that creates a clear and present danger of the commission of unlawful acts, the violation of lawful school regulations, or the material and substantial disruption of the orderly operation of the school or that violates the rights of others to privacy or that threatens violence to property or persons.

(4) The board of education of each school district shall adopt a written publications code, which shall be consistent with the terms of this section, and shall include reasonable provisions for the time, place, and manner of conducting free expression within the school district's jurisdiction. The publications code shall be distributed, posted, or otherwise made available to all students and teachers at the beginning of each school year.

(5)

(a) Student editors of school-sponsored student publications shall be responsible for determining

the news, opinion, and advertising content of their publications subject to the limitations of this section. It shall be the responsibility of the publications advisor of school-sponsored student publications within each school to supervise the production of such publications and to teach and encourage free and responsible expression and professional standards for English and journalism.

(b) For the purposes of this section, "publications advisor" means a person whose duties include the supervision of school-sponsored student publications.

(6) If participation in a school-sponsored publication is part of a school class or activity for which grades or school credits are given, the provisions of this section shall not be interpreted to interfere with the authority of the publications advisor for such school-sponsored publication to establish or limit writing assignments for the students working with the publication and to otherwise direct and control the learning experience that

> the publication is intended to provide.
>
> (7) No expression made by students in the exercise of freedom of speech or freedom of the press shall be deemed to be an expression of school policy, and no school district or employee, or parent, or legal guardian, or official of such school district shall be held liable in any civil or criminal action for any expression made or published by students.
>
> (8) Nothing in this section shall be construed to limit the promulgation or enforcement of lawful school regulations designed to control gangs. For the purposes of this section, the definition of "gang" shall be the definition found in section 19-1-103(52), C.R.S.

Colo.Rev.Stat. § 22-1-120. The district court found that the statute's plain meaning prohibited only prior restraint of student expression that is contained within a publication.

Colorado follows the general rule of statutory construction that when construing a statute, we must begin with the statute's plain language, and if the "statute is clear and unambiguous on its face, then we need not look beyond the plain language and we must apply the statute as written." *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo.2004) (internal citations and quotations omitted). In addition, Colorado law dictates that "we afford the language of statutes their ordinary and common meaning and construe statutory provisions as a whole, giving effect to every word and term contained therein, whenever possible." *Id.* (internal quotations and alterations

omitted).

Both parties argued in the district court and in their briefs to this court that section 22-1-120 is not ambiguous.[8] The district court so found and we agree that the statute is not ambiguous. We further agree with the district court's reading of the plain meaning of the statute. The actual prohibition from subsection 22-1-120(1) is that "no expression contained in a student publication, whether or not such publication is school-sponsored, shall be subject to prior restraint."

Although the statute begins with a general statement that students in public schools "shall have the right to exercise freedom of speech and of the press" it is clear from reading the entire statute that section 22-1-120 regulates only student "expression" that is contained within a written "publication." There are numerous provisions of section 22-1-120 pertaining to written speech and journalism to further emphasize this point: § 22-1-120(1) ("encouraging expression which is consistent with high standards of ... journalism"); § 22-1-120(2) ("If a publication written substantially by students is made generally available throughout a public school, it shall be a public forum for students of such school."); § 22-1-120(4) ("The board of education of each school district shall adopt a written publications code ...."); §

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[8] At oral argument, Corder changed course and argued for the first time that Colo.Rev.Stat. § 22-1-120 is ambiguous. An argument made for the first time at oral argument, however, will not be considered. *Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 805 (10th Cir.1998) ("Issues raised for the first time at oral argument are considered waived.").

22-1-120(5) ("Student editors of school-sponsored student publications shall be responsible for determining the news, opinion, and advertising content of their publications subject to the limitations of this section."); and § 22-1-120(6) ("If participation in a school-sponsored publication is part of a school class or activity ... the provisions of this section shall not be interpreted to interfere with the authority of the publications advisor for such school-sponsored publication to establish or limit writing assignments for the students working with the publication....").

Further, even if the statute were ambiguous, there is no legislative history or Colorado case law which would alter our plain-meaning analysis. It appears, however, that section 22-1-120 was passed by the Colorado legislature in the wake of *Hazelwood* and the concern regarding its impact on student newspapers. *See, e.g.*, Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 Tenn. L.Rev. 481, 501, n. 161 (2001) (describing Colo.Rev.Stat. § 22-1-102 as an effort by Colorado to pass an "anti-*Hazelwood*" law to protect student publications). This "response to *Hazelwood* " is another indication that the Colorado legislature meant for this statute to be limited in applicability to written student publications.

We affirm the district court's grant of judgment on the pleadings to the School District on Corder's state-law claim, as Corder's claim does not fall within Colo.Rev.Stat. § 22-1-120.

III

We AFFIRM the district court's grant of the School District's Fed.R.Civ.P. 12(c) motion for judgment on the pleadings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF COLORADO

JUDGE WALKER D. MILLER

Civil Action No. 07-cv-01798-WDM-MJW.

Erica CORDER, Plaintiff,

v.

LEWIS PALMER SCHOOL DISTRICT No. 38,

Defendant.

ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS

MILLER, J.

This matter is before me on Defendant's Motion for Judgment on the Pleadings (doc no 24) seeking to dismiss Plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(1) and (c). Plaintiff opposes the motion. For the reasons set forth below, Defendant's motion will be granted and Plaintiff's complaint will be dismissed.

Background

According to her complaint, Plaintiff was a student at Lewis Palmer High School and one of fifteen students named as class valedictorian for the graduating class of 2006. In most previous years, the valedictorians were each permitted to give a short speech at the school's graduation ceremony. Prior to the 2006 ceremony, the school's principal, Mark Brewer, informed the valedictorians that they could decide whether all of the fifteen valedictorians, or a subset thereof, would deliver the valedictorian message. He did not provide any further instructions concerning the conduct or content of the speeches. The valedictorians themselves decided that each of them would speak for approximately 30 seconds and decided on a general topic for the speakers. The valedictorians selected Plaintiff and another student to deliver the concluding section of the speech.

Before a valedictorian would be allowed to present his or her speech at graduation, Mr. Brewer required each valedictorian to present his or her speech to him to review the content of each student's speech. The school district has a written policy governing student expression which prohibits a variety of types of speech such as slander and profanity, as well as speech that "[t]ends to create hostility or otherwise disrupt the orderly operation of the educational process." The policy makes no reference to religious speech.

Plaintiff presented her speech to Mr. Brewer before the ceremony; that speech did not mention her religious faith or Jesus. However, at the graduation ceremony, Plaintiff gave the following speech:

> Throughout these lessons our teachers, parents, and let's not forget our peers have supported and encouraged us along the way. Thank you all for the past four amazing years. Because of your love and devotion to our success, we have all learned how to endure change and remain strong individuals. We are all capable of standing firm and expressing our own beliefs, which is why I need to tell you about someone who loves you more than you could ever imagine. He died for you on a cross over 2,000 years ago, yet was resurrected and is living today in heaven. His name is Jesus Christ. If you don't already know Him personally I encourage you to find out more about the sacrifice He made for you so that you now have the opportunity to live in eternity with Him. And we also encourage you, now that we are all ready to encounter the biggest change in our lives thus far, the transition from childhood to adulthood, to leave Lewis-Palmer with confidence and integrity. Congratulations class of 2006.

At the conclusion of the ceremony, Plaintiff was escorted by a teacher to see Assistant Principal Bob Felice, who informed her that she would not receive her diploma and had to make an appointment with Principal Brewer. Plaintiff and her parents met with Mr. Brewer on May 30, 2006. Plaintiff believed and understood from Mr. Brewer that she would not receive her diploma unless she publicly apologized for the speech. Plaintiff did not apologize for the content of her speech, but prepared a written statement explaining that

the statements were her personal beliefs made without Mr. Brewer's prior approval. The draft submitted by Plaintiff is as follows:

> At graduation I know some of you may have been offended by what I said during the valedictorian speech. I did not intend to offend anyone. I also want to make it clear that Mr. Brewer did not condone nor was he aware of my plans before giving the speech. I'm sorry I didn't share my plans with Mr. Brewer or the other valedictorians ahead of time. The valedictorians were not aware of what I was going to say. These were my personal beliefs and may not necessarily reflect the beliefs of the other valedictorians or the school staff.

Mr. Brewer required that she insert the following sentence into the statement: "I realize that, had I asked ahead of time, I would not have been allowed to say what I did." Plaintiff received her diploma and the statement was distributed via email.

Plaintiff filed this lawsuit asserting the following claims: (1) violation of freedom of speech under the First Amendment; (2) compelled speech in violation of the First Amendment; (3) violation of the right to equal protection under the Fourteenth Amendment; (4) violation of freedom of religion under the First Amendment; (5) violation of C.R.S. § 22-1-120; and (6) violation of the Establishment Clause of the First Amendment. Plaintiff seeks nominal damages and declaratory and injunctive relief.

Standard of Review

A motion for a judgment on the pleadings pursuant to Rule 12(c) is evaluated under the same standard as a motion brought under Rule 12(b)(6). A complaint must be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). The court must accept as true all well-pleaded facts and construe all reasonable allegations in the light most favorable to the plaintiff. *United States v. Colorado Supreme Court*, 87 F.3d 1161, 1164 (10th Cir.1996).[1]

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[1] The parties have also filed motions for summary judgment (docs no 33 and 34), which are fully briefed. However, the evidence submitted with the summary judgment briefs does not contradict the salient facts of the pleadings. In particular, it is undisputed that the school required review of the valedictorian speeches and that Plaintiff did not disclose any hint that her portion of the speech would include religious references because of her concern that the school would not permit her to do so. Accordingly, even if I considered these issues under the summary judgment standard with additional facts, I would reach the same end result, namely dismissal because no reasonable jury would find for the Plaintiff on the basis of the undisputed facts.

Discussion

1. Claims for Declaratory and Injunctive Relief

Defendant first argues that Plaintiff's claims for declaratory and injunctive relief should be dismissed as moot. Specifically, because Plaintiff has graduated and received her diploma, there no longer exists a "live controversy" in this matter, the claim is moot, and this court does not have jurisdiction. *Lane v. Simon,* 495 F.3d 1182, 1186-87 (10th Cir.2007) ("Because defendants can no longer impinge upon plaintiffs' exercise of freedom of the press, plaintiffs' claims for declaratory and injunctive relief are moot."). I agree.

Plaintiff argues in response that she does not seek injunctive relief. This is in direct contradiction to her Verified Complaint, which clearly sets forth in the Prayer for Relief a request that this court "issue a permanent injunction enjoining Defendant ... from enforcing its unwritten policy [of] reviewing student graduation speeches to censor out religious speech." Plaintiff also contends that there is a live issue because some of Defendant's conduct occurred after graduation, and so Plaintiff's graduation does not moot her claims. Plaintiff misses the point. Just as in *Lane,* Defendant is no longer in a position to screen Plaintiff's graduation speech, prevent her from giving a speech containing religious references, or compel her to issue an apology for doing so by conditioning receipt of her diploma upon such an apology-i.e., the defendant can no longer impinge on Plaintiff's freedom of speech and religion. Accordingly, Plaintiff's claims for declaratory or injunctive relief based on such conduct are

moot.[2]

2. First Amendment Freedom of Speech

Plaintiff's first claim is based on several theories, including (1) forcing Plaintiff to apologize fomentioning Jesus Christ violated her free speech rights; (2) requiring the speeches to be screened was an unconstitutional prior restraint and screens out too much protected speech; (3) there were no written guidelines to control the decisionmaker's editing of student speeches; (4) screening of graduation speeches amounts to content and viewpoint restrictions on speech; (5) Plaintiff was improperly punished for her speech because it did not contain any elements prohibited by the school district's written policy regulating student speech and expression; and (6) forcing Plaintiff to apologize amounted to punishing Plaintiff on the basis of her religious viewpoint.

Defendant argues that Plaintiff's speech was not curtailed, since she gave the speech she wanted to, and that she was not required to apologize for the content of her speech but rather for possibly giving offense and for failing to disclose the content of her speech, which represented her views alone, to Mr. Brewer and the other valedictorians. Defendant also argues that the Plaintiff's speech should be analyzed as "school-sponsored speech." Under this line of case law, Defendant argues, the school has the right to

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[2] Plaintiff also argues that her claim for nominal damages is not moot. Since Defendant did not challenge Plaintiff's nominal damages claims on mootness grounds, I need not address the issue.

monitor and control student expression under certain circumstances. Plaintiff argues in response that her speech was purely private speech that cannot be limited as Defendant contends.

The United States Supreme Court has established that although students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the First Amendment rights of students "are not automatically coextensive with the rights of adults in other settings." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (citations omitted). Purely private speech that happens to occur on school property should not be infringed unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Similarly, speech in a limited public forum may only be subject to viewpoint-neutral limitations. *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir.2007). Thus, to the extent that Plaintiff's speech is considered private speech or the graduation ceremony is considered to be a public forum, the *Tinker* analysis should apply. However, a school facility is deemed a public forum only if the school authorities have by policy or practice opened those facilities "for indiscriminate use by the general public" or by some segment of the public such as student organizations. *Hazelwood*, 484 U.S. at 267, 108 S.Ct. 562 (citations omitted). "If the facilities have instead been reserved for other intended purposes ... then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other

members of the school community." *Id.* (citations omitted).

"The question whether the First Amendment requires a school to tolerate particular student speech ... is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Hazelwood,* 484 U.S. at 270-71, 108 S.Ct. 562. "The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 271, 108 S.Ct. 562. Educators are entitled to exercise "greater control" over this kind of student expression "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.* Thus, a school may retain authority to refuse to sponsor student speech that might be perceived to, *inter alia,* "associate the school with any position other than neutrality on matters of political controversy." *Id.* at 272, 108 S.Ct. 562. School-sponsored expressive activities, therefore, may be subject to educators' editorial control without offending the First Amendment so long as the educators' actions are "reasonably related to legitimate pedagogical concerns." *Id.* at 273, 108 S.Ct. 562.

The Supreme Court has also held that the

Establishment Clause of the First Amendment is violated in circumstances where a student's delivery of a religious message before a sporting event would be perceived as "stamped with her school's seal of approval." *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). *Santa Fe* concerned a school policy intended to remedy the apparent constitutional violation deriving from the school's previous practice of presenting a prayer or invocation before football games. Under the new policy, the students voted on whether a prayer would be part of the activity. The Court deemed that the appearance of religious endorsement of a student-delivered prayer nonetheless came from the following factors: the invocation was delivered to a large audience assembled as part of a regularly scheduled school-sponsored function on school property, broadcast over the school's public address system which remained subject to the control of school officials, the invocation was part of a pregame ceremony presumably clothed in the traditional indicia of a school sporting event and prominently displaying the school's name. Santa Fe, 530 U.S. at 307-08, 120 S.Ct. 2266. The Court concluded that the delivery of a religious message "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer ... is not properly characterized as 'private' speech." *Id.* at 310, 120 S.Ct. 2266.

These principles were recently applied by the Tenth Circuit in *Fleming v. Jefferson County Sch. Dist. R-1,* 298 F.3d 918 (10th Cir.2002). *Fleming* involved a tile painting project at Columbine High School, the site of a notorious school shooting incident. Upon deciding to reopen the school,

the school district approved a project whereby students and other community members would create artwork on 4 x 4 tiles, which would then be installed throughout the school. The purpose of the project was to assist in reintroducing students to the school building, changing the school's appearance, and to have the students be a part of reconstruction of their school. The project was not intended to be a memorial to the tragedy; accordingly, the guidelines for artwork prohibited references to the date of the attack, names or initials,[3] religious symbols, and obscene or offensive content. The Tenth Circuit, interpreting *Hazelwood*, analyzed the two aspects of the standard for school-sponsored speech: the imprimatur concept and the pedagogical interest of the school. 298 F.3d at 924. The imprimatur concept concerns speech "so closely connected to the school that it appears the school is somehow sponsoring the speech" and derives from such factors as the level of involvement of school officials in organizing and supervising the event. *Id.* at 925. The pedagogical interest standard is satisfied if the activity is "designed to impart particular knowledge or skills to student participants and audiences." *Id.* Moreover, several other courts have established that the pedagogical test may be satisfied "simply by the school district's desire to avoid controversy within a school environment." *Id.* at 925-26 (listing cases). The Tenth Circuit concluded that *Hazelwood* "allows educators to make viewpoint-based decisions about school-sponsored speech." *Id.* at 926.

Turning to the merits of the case, the court in *Fleming* determined that the tile project was not a public forum,

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[3] This portion of the guidelines was thereafter changed.

because the school district took numerous actions demonstrating its intent to retain editorial control and responsibility over the project; in other words, the district had not "opened the tile project to indiscriminate use by the participants." *Id.* at 929. In addition, the project bore the imprimatur of the school, as the tiles would be permanently affixed to the school building; moreover, the project was funded, organized, and controlled by the district in terms of selecting participants, holding the tile painting sessions at the school, and setting forth content guidelines. *Id.* at 930-31. Finally, the goal of the tile project involved pedagogical concerns and the guidelines were reasonably related to those concerns. *Id.* at 931-33. Noting that the school has a legitimate interest in "preventing disruptive religious debate on the school's walls," the Tenth Circuit concluded that the restriction on religious content was appropriate. *Id.* at 934.

Applying those standards to this case, I conclude that the valedictorian speech at the school's graduation was not private speech in a limited public forum but rather school-sponsored speech. The school limited the opportunity to speak to valedictorians and screened the content of their speeches. The school, by permitting its highest achieving students give short speeches, did not open its facilities for "indiscriminate use." Accordingly, school officials were entitled to regulate the content of the speeches in a reasonable manner. In addition, the commencement ceremony, even the portion of which the student valedictorian speeches comprised, was school-sponsored expression. The graduation ceremony clearly bears the imprimatur of the school, as it was sponsored, organized, and supervised by school officials. The school sought to exert control over the content of the valedictorian speeches by requiring them to be heard in

advance by the principal. In addition, Defendant argues persuasively that the graduation ceremony has a pedagogical concerns as a "final lesson" for departing seniors and that limiting religious exhortations by student speakers would be related to a legitimate concern of not associating the school "with any position other than neutrality on matters of political controversy." *Hazelwood*, 484 U.S. at 272, 108 S.Ct. 562.

Accordingly, Defendant did not violate Plaintiff's First Amendment rights by seeking to screen the content of her speech based on matters reasonably related to the school's legitimate pedagogical concerns. I note also that the Supreme Court in *Hazelwood* expressly rejected the requirement that such editing be pursuant to a written policy. 484 U.S. at 273 n. 6, 108 S.Ct. 562.Moreover, as discussed further below, Plaintiff's actions to evade this screening gave the school a legitimate justification to require an apology.

Plaintiff argues that the analysis of *Tinker* should apply here because of the effect of a state statute, which provides that, "No expression made by students in the exercise of freedom of speech or freedom of the press shall be deemed to be an expression of school policy, and no school district ... shall be held liable in any civil or criminal action for any expression made or published by students." C.R.S. § 22-1-120(7).[4] Plaintiff has offered no legal analysis to explain

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[4] Plaintiff also argues that another section of this statute means that no school can issue any kind of prior restraint on student speech. C.R.S. § 22-1-120(1) ("no expression contained in a student publication, whether or not such publication is school-sponsored, shall be subject to prior restraint [with certain exceptions].") For the reasons discussed

how this state statute should alter the federal jurisprudence on private speech versus school-sponsored speech under the First Amendment. I do not read this passage to require schools to give over its fora to student speech without regulation, which is what Plaintiff appears to contend. Moreover, I conclude that the effect of the statute, which might insulate the school from liability for a student's expression "in the exercise of freedom of speech" does not transform Plaintiff's remarks in the valedictorian address into private speech. Accordingly, I disagree that the analysis of *Tinker* or *Adler v. Duval County Sch. Board*, 250 F.3d 1330 (11th Cir.2001) should apply.[5]

3. Compelled Speech

As Defendant notes, Plaintiff expressly alleges in her complaint that she "did not apologize for the content of her speech, but prepared a written statement explaining that the statements were her personal beliefs made without Principal Brewer's prior approval." Complaint ¶ 42. Plaintiff was not

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under Part 6, *infra*, I conclude this statute is inapplicable to the issues of this case.

[5]*Adler*, upon which Plaintiff puts much reliance, involves a short message at the school graduation ceremony by a student speaker not chosen by the school and over whom the school exercised no editorial control at all. Indeed, the published school policy expressly provided that the purpose of the policy was to allow selected students to speak "*without monitoring or review by school officials*." 250 F.3d at 1332 (emphasis added in the original). Plainly, those facts make *Adler* distinguishable and inapplicable to the issues here.

coerced to express a belief, which would be prohibited. *West Virginia Board of Educ. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Rather, Plaintiff was compelled to apologize for evading the principal's instructions regarding the speech and for any offense her actions might have caused the audience. I conclude this is well within the authority of the school district and does not amount to constitutionally prohibited coerced speech. *See Wildman ex rel. Wildman v. Marshalltown Sch. Dist.,* 249 F.3d 768, 771 (8th Cir.2001) (no constitutional violation to require student to issue apology as condition of continuing on sports team after student circulated an insubordinate letter; "It is well within the parameters of school officials' authority ... to teach civility and sensitivity in the expression of opinions"). Plaintiff appears to primarily object to having to add to her apology that "had I asked ahead of time, I would not have been allowed to say what I did," apparently because she believes she should have been allowed to include religious content in her speech. Given the authority discussed above, I conclude that requiring Plaintiff to include this statement in her written apology also did not violate her First Amendment rights.

Plaintiff also appears to object to the apology statement because it required her to be painted as "a liar and deceiver" as a condition of receiving her diploma. Since Plaintiff does not assert a due process claim, I see no constitutional implication from the school allegedly using the diploma as leverage for the apology. Moreover, although Plaintiff's actions appear to have been based on her deeply held commitment to her faith, her own allegations demonstrate that she evaded the school's efforts to control the content of the valedictorian speech. Her failure to disclose the religious nature of her speech gave the principal, her

classmates, and others no notice of her intended speech. Plaintiff does not contend that anything was false in her apology (other than her belief that she would or should have been allowed to say what she did) and the statements appear factually accurate. In such circumstances, I perceive no violation of Plaintiff's constitutional rights in having to issue the statement.

4. Equal Protection

Defendant argues that Plaintiff's equal protection claim should be dismissed because she was not treated differently than anyone similarly situated to her; since Plaintiff was the only one who deviated from her rehearsed speech, she cannot show that Defendant treated her differently without a legally justified basis. In response, Plaintiff's argument is that she did not do anything wrong, she only "rehearsed a speech before Mr. Brewer and then offered a speech referencing Jesus," which should not be considered a misrepresentation. Response at 18. Plaintiff's argument is unavailing. Although Plaintiff disagrees that her conduct should be considered "deceitful," there is no indication that any other student engaged in the same conduct she did and, therefore, she was not treated differently from any similarly situated person. Therefore, this claim also must fail.

5. Free Exercise of Religion

Defendant argues that Plaintiff's free exercise claim must be dismissed because the school took no action that placed a substantial burden on her religion, citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Specifically, Defendant argues that Plaintiff cannot

demonstrate that it substantially burdened her religion to be required to issue a statement to the community clarifying that her religious beliefs were her own, that her speech was not condoned by the principal of her school, that the principal and others were not aware of what she was going to say, and that she would not have been permitted to make the religious references had she asked first. In response, Plaintiff argues that she was punished for her Christian viewpoint and her diploma withheld, and that this states a plausible free exercise claim. Plaintiff cites no authority in support of her position. As discussed, the school district was within its legal authority to exert editorial control over school-sponsored speech at the graduation and to insist on an apology and clarification for Plaintiff's conduct in evading such efforts at control and thereby associating the school with a position other than neutrality on religion. Plaintiff's religious practice was not impinged or burdened; rather, she simply was obligated to follow the same rules as the other valedictorians and to realize the consequences when she did not. *Swanson v. Guthrie Indep. Sch. Dist. No. I-L,* 135 F.3d 694, 702 (10th Cir.1998) (The Free Exercise clause is "designed to prevent the government from impermissibly burdening an individual's free exercise of religion, not to allow an individual to exact special treatment from the government."). I conclude that Plaintiff's Establishment Clause claim fails on the same basis.

6. Colorado State Law Claim

Plaintiff's final claim is for violation of C.R.S. § 22-1-120, apparently on the grounds that the policy of screening speeches constitutes a prior restraint of expression in a student publication. C.R.S. § 22-1-120(1) provides:

> The general assembly declares that students of the public schools shall have the right to exercise freedom of speech and of the press, and no expression contained in a student publication, whether or not such publication is school-sponsored, shall be subject to prior restraint except for the types of expression described in subsection (3) of this section. This section shall not prevent the advisor from encouraging expression which is consistent with high standards of English and journalism.

Subsection (3) lists exceptions to this general prohibition, including expression that is obscene, defamatory, false as to persons who are not public figures, and expression that presents a clear and present danger of the commission of wrongful acts. C.R.S. § 22-1-120(3). As noted in Part 2 above, Plaintiff also appears to argue that this and other provisions mean that the school cannot regulate the content of student speech in school fora in any manner inconsistent with this statute. Defendant contends that this provision applies only to written publication, such as school newspapers. I agree with Defendant's reading of this statute.

Under Colorado state law, a court construing a statute must first look at the statute's plain language, and if it is clear and unambiguous on its face, the court should look no further and apply the statute as it is written. Vigil v. Franklin, 103 P.3d 322, 327 (Colo.2004). Neither side argues that this provision is ambiguous and I read it as having plain meaning. Although the section begins with a recognition that students in public schools "shall have the right to exercise freedom of speech and of the press" it goes on to specifically prohibit

prior restraint of "expression" that is contained within a "publication." Were this provision intended to encompass all kinds of speech, including oral speech, the statute need only reference "expression" and the inclusion of "publication" would be surplusage.[6]

Moreover, the entire context of the statute makes clear that "publication" means written media, such as a student newspaper, since there are numerous provisions pertaining to written speech and journalism but not to oral speech, including: subsection (1) ("encouraging expression which is consistent with high standards of ... journalism"); subsection (2) ("If a publication *written* substantially by students is made generally available throughout a public school, it shall be a public forum for students of such school") (emphasis added); subsection (4) ("The board of education of each school district shall adopt a written publications code); subsection (5) ("Student *editors* of school-sponsored student publications shall be responsible for determining the *news, opinion, and advertising content of their publications* subject to the

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[6] This construction is further supported by subsection (7) of the statute, noted *supra,* which provides that "no school district ... shall be held liable in any civil or criminal action for any expression *made* or *published* by students."C.R.S. § 22-1-120(7) (emphasis added). Expression "made" is clearly a broader category of speech than expression "published," which is reasonably limited to written speech which is then reproduced and distributed to a wider audience, like a newspaper.

limitations of this section.") (emphasis added); and subsection (6) ("If participation in a school-sponsored publication is part of a school class or activity ... the provisions of this section shall not be interpreted to interfere with the authority of the publications advisor for such school-sponsored publication to establish or limit *writing assignments* for the students working with the publication ...") (emphasis added). C.R.S. § 22-1-120.

Moreover, even if this provision were ambiguous, Plaintiff's interpretation would mean that this statute prevents a school from regulating speech that could violate the Establishment Clause (i.e., even student speech, such as that in *Santa Fe,* which could reasonably be perceived as school endorsement of a religious message, could not be constrained). Such an interpretation would be plainly unconstitutional under *Santa Fe* and *Hazelwood* and therefore is a construction I should avoid.[7] *Thorpe v. State,* 107 P.3d 1064, 1068 (Colo.App.2004) ("Where a statute is susceptible of a constitutional as well as an unconstitutional construction, the legislature will be presumed to have intended the

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[7] Subsection (7) does not avoid this problem by decreeing that no student expression "shall be deemed to be an expression of school policy." C.R.S. § 22-1-120(7). The *Hazelwood* test deals with public perception, i.e., that something closely connected to the school will be seen as bearing the imprimatur of the school. *See Fleming,* 298 F.3d at 925. That perception cannot be made to vanish by legislative fiat.

constitutional construction."); *BCW Enters., Ltd. v. Indus. Claim Appeals Office,* 964 P.2d 533, 537 (Colo.App.1997) ("when possible, statutes should be construed so as to avoid questions of their constitutional validity").

Therefore, I conclude that section 22-1-120(1) by its plain terms does not apply to these circumstances and, even if it did, cannot be construed to prohibit a school from regulating speech that could violate the Establishment Clause.

Accordingly, it is ordered:

1. Defendant's Motion for Judgment on the Pleadings (doc no 24) is granted. Judgment shall enter in favor of Defendant and against Plaintiff on all claims.

DATED at Denver, Colorado, on July 30, 2008.

BY THE COURT:

s/Walker D. Miller

United States District Judge

142

(2)

No. 09-257

Supreme Court, U.S.
FILED
OCT 13 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ERICA CORDER,

Petitioner,

v.

LEWIS-PALMER SCHOOL DISTRICT NO. 38,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment prohibits school officials from exercising editorial control over the remarks of student graduation speakers.

2. Assuming that the First Amendment does not prohibit school officials from exercising editorial control over the remarks of student graduation speakers, what limitations, if any, does the First Amendment place on the authority of school officials to discipline a student who has evaded the mandatory review process.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
A. Introduction	1
B. Procedural Posture	2
C. Statement of Facts	2
REASONS FOR DENYING THE PETITION	5
I. Applicable Standards	5
A. Criteria for Granting a Writ	5
B. Standard of Review	6
II. The Petition Does Not Satisfy the Criteria for Review	6
A. The Tenth Circuit Correctly Applied *Hazelwood*	7
B. There is No Conflict Between Circuits	10
C. The Compelled Speech Claim Does Not Present a Certworthy Issue	13
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Adler v. Duval County Sch. Bd., 206 F.3d 1070 (11th Cir. 2000) 10, 11

Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) 12

Ashby v. Isle of Wright County Sch. Bd., 354 F. Supp. 2d 616 (E.D. Va. 2004) 10, 20

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 9

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) 2, 6

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) 12

Brandt v. Bd. of Educ. of City of Chicago, 480 F.3d 460 (7th Cir. 2007) 12

C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159 (3rd Cir. 2005) 17

Cohen v. Cowles Media Inc., 501 U.S. 663 (1991) 19

Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir. 2000) 10, 20

Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519 (1983) 6, 9

Couture v. Bd. of Educ., 535 F.3d 1243 (10th Cir. 2008) 16

Epperson v. Arkansas, 393 U.S. 97 (1968) 13

Garcetti v. Ceballos, 547 U.S. 410 (2006) 18

TABLE OF AUTHORITIES – Continued

Page

Goss v. Lopez, 419 U.S. 565 (1975).....15

Guiles v. Marineau, 461 F.3d 320 (2nd Cir. 2006).....12

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).....*passim*

Ingraham v. Wright, 430 U.S. 651 (1977).....15

Kicklighter v. Evans County Sch. Dist., 968 F. Supp. 712 (S.D. Ga. 1997).....16, 20

Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979 (9th Cir. 2003).....10, 20

Mathews v. Eldridge, 424 U.S. 319 (1976).....15

McCreary County v. Am. Civil Liberties Union, 545 U.S. 844 (2005).....19

Morse v. Frederick, 551 U.S. 393 (2007).....12, 16

Nelson v. State Farm Mut. Auto. Ins. Co., 419 F.3d 1117 (10th Cir. 2005).....6

Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965 (S.D. Ohio 2005).....12

Nuxoll ex rel. Nuxoll v. Indian Prairie School Dist. # 204, 523 F.3d 668 (7th Cir. 2008).....12

Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647 (W.D. Tex. 2000).....16, 19

Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988).....16

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995).....18

TABLE OF AUTHORITIES – Continued

Page

Rust v. Sullivan, 500 U.S. 173 (1991) 18

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 13

Wildman v. Marshalltown Sch. Dist., 249 F.3d 768 (8th Cir. 2001) 16, 19

Wofford v. Evans, 390 F.3d 318 (4th Cir. 2004) 16

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 11

STATUTES

Colorado Revised Statute section 22-1-120 (2008) 1

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. I ..... *passim*

U.S. CONST. AMEND. XIV, § 1 ..... 2, 14

RULES AND REGULATIONS

Sup. Ct. R. 10(a) 6

OTHER AUTHORITIES

1990 COLO. SESS. LAWS 1042 1

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) 10, 19

STATEMENT OF THE CASE

A. Introduction

The Petition's "Questions Presented" and "Statement of the Case" do not accurately reflect the issues that would be before the Court if the petition is granted.

An accurate recitation of facts is found in section C below.

In addition, the introductory paragraph to the Petition's "Questions Presented" briefly quotes from Colorado Revised Statute section 22-1-120 (2008) apparently to persuade the Court that Colorado state law prohibits school officials from exercising editorial control over the remarks of student speakers at commencement exercises. The full text of the statute is set forth in the Appendix. The statutory text makes clear that the statute concerns student publications, not school activities such as graduation exercises. The scope of the statute has not been addressed by any Colorado court since its adoption more than nineteen years ago. 1990 COLO. SESS. LAWS 1042. Thus, the Petition asks the Court to decide a question of federal constitutional law based upon an interpretation of a state law that is not supported by the text of the statute, nor any state court interpretation of the statute.

B. Procedural Posture

Petitioner Erica Corder filed suit against the Lewis-Palmer School District asserting claims under the Free Speech, Establishment, and Free Exercise clauses of the First Amendment, the Equal Protection clause of the Fourteenth Amendment, and Colorado statutory law. The School District moved for judgment on the pleadings with respect to all claims. The parties completed discovery while the motion was pending, then filed cross motions for summary judgment. The district court granted the motion for judgment on the pleadings, stating that the summary judgment briefs did not contradict the facts upon which the court based its decision.

Ms. Corder appealed the district court's ruling as to each claim. The Court of Appeals for the Tenth Circuit affirmed.

Ms. Corder asks this Court to review the Tenth Circuit's disposition of the free speech issues.

C. Statement of Facts

Ms. Corder was one of fifteen students named as valedictorian for the 2006 graduating class of Lewis-Palmer High School.[1] (Compl. ¶¶ 10, 14.) Prior to the

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[1] The Court of Appeals' decision arose in the context of a motion for judgment on the pleadings. In deciding a motion for judgment on the pleadings, a court must assume that all allegations in the complaint are true. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). Therefore, the Statement of

(Continued on following page)

commencement ceremony, school principal Mark Brewer told the valedictorians that they could decide whether all of the fifteen valedictorians, or a subset thereof, would deliver the valedictory message. (*Id.* ¶ 16.) He did not provide any further instructions concerning the conduct or content of the speech. (*Id.* ¶ 17.) The valedictorians decided on a general topic for the address and that each valedictorian would speak for approximately 30 seconds.[2] (*Id.* ¶¶ 20-21.) They also decided that Ms. Corder would speak last. (*Id.* ¶ 24.)

Before the valedictorians would be allowed to speak, however, they first were required to present their remarks to Mr. Brewer so that he could review them for appropriateness. (*Id.* ¶¶ 27-28.) The speech that Ms. Corder presented to Mr. Brewer for his review did not mention religion. (*Id.* ¶ 29.) At graduation, Ms. Corder concluded the valedictory address as follows:

> Throughout these lessons our teachers, parents and let's not forget our peers have supported and encouraged us along the way. Thank you all for the past four amazing

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Facts set forth above is taken directly from Ms. Corder's complaint. The School District denied many of these allegations, and produced evidence to support those denials in its motion for summary judgment. Nothing contained herein should be construed as a concession with respect to those allegations.

[2] The complaint does not disclose the topic that the valedictorians chose to address.

> years. Because of your love and devotion to our success, we have all learned how to endure change and remain strong individuals. We are all capable of standing firm and expressing our own beliefs, which is why I need to tell you about someone who loves you more than you could ever imagine. He died for you on a cross over 2,000 years ago, yet was resurrected and is living today in heaven. His name is Jesus Christ. If you don't already know Him personally I encourage you to find out more about the sacrifice He made for you so that you now have the opportunity to live in eternity with Him. And we also encourage you, now that we are all ready to encounter the biggest change in our lives thus far, the transition from childhood to adulthood, to leave Lewis-Palmer with confidence and integrity. Congratulations class of 2006.

(*Id.* ¶ 30.)

At the conclusion of the ceremony, Ms. Corder was told that she needed to meet with Mr. Brewer and would not be receiving her diploma. (*Id.* ¶¶ 31-33.) At the subsequent meeting, Mr. Brewer told Ms. Corder that her comments were immature and that she would not receive her diploma until she issued an apology approved by Mr. Brewer. (*Id.* ¶¶ 35-37.)

In response, Ms. Corder drafted the following statement:

> At graduation I know some of you may have been offended by what I said during the

> valedictorian speech. I did not intend to offend anyone. I also want to make it clear that Mr. Brewer did not condone nor was he aware of my plans before giving the speech. I'm sorry I didn't share my plans with Mr. Brewer or the other valedictorians ahead of time. The valedictorians were not aware of what I was going to say. These were my personal beliefs and may not necessarily reflect the beliefs of the other valedictorians or the school staff.

(*Id.* ¶ 43.)

Mr. Brewer reviewed and approved the statement, but required Ms. Corder to add: "I realize that, had I asked ahead of time, I would not have been allowed to say what I did." (*Id.* ¶ 44.) Ms. Corder did include the required statement. (*Id.*) The statement was then distributed via email to the Lewis-Palmer school community. (*Id.* ¶ 46.) Ms. Corder received her diploma. (*Id.* ¶ 47.)

REASONS FOR DENYING THE PETITION

I. Applicable Standards

A. Criteria for Granting a Writ.

In deciding whether to grant a petition for a writ of certiorari, this Court's discretion is guided by three factors: Whether the decision (1) conflicts with decisions of other circuits; (2) conflicts with a decision of a state court of last resort; or (3) departs so far from the

accepted course of judicial proceedings as to warrant an exercise of the Court's supervisory power. Sup. Ct. R. 10(a).

B. Standard of Review.

This case arises in the context of a motion for judgment on the pleadings. An appellate court reviews a lower court's decision to grant a motion for judgment on the pleadings under the *de novo* standard of review, determining for *itself* whether the factual allegations, which are assumed to be true, state a claim for relief. *Nelson v. State Farm Mut. Auto. Ins. Co.*, 419 F.3d 1117, 1120 (10th Cir. 2005). In deciding such a motion a court need not accept as true allegations that the plaintiff has not alleged. *Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526 (1983). Rather, the factual allegations of the complaint must "raise a right to relief above the speculative level." *Bell Atlantic Corp.*, 127 S. Ct. at 1965.

II. The Petition Does Not Satisfy the Criteria for Review

While Ms. Corder postures this case as a free speech case, the allegations of the complaint make clear that she said exactly what she wished to say at graduation. Ms. Corder's "injury," if any, is that she was called to account for evading the mandatory review process. Ms. Corder, of course, does not have a constitutional right to evade a constitutionally permissible rule. Therefore, the first question is whether

the First Amendment prohibits school officials from exercising editorial control over the remarks of student graduation speakers. Assuming that the First Amendment does not prohibit school officials from exercising editorial control over the remarks of student graduation speakers, the second question becomes what limitations, if any, does the First Amendment place on the authority of school officials to discipline a student who has deliberately evaded the review process.

The Tenth Circuit's answers to these questions are consistent with this Court's precedents and do not conflict with any federal circuit.

A. The Tenth Circuit Correctly Applied *Hazelwood*.

The Tenth Circuit held that the First Amendment did not prohibit school officials from exercising editorial control over the remarks of student graduation speakers, relying on this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

Hazelwood arose out of a conflict between student reporters and the school principal regarding articles to be published in the school newspaper. This Court framed the issue as follows:

> The question of whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from

> the question whether the First Amendment requires a school to affirmatively promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the community might reasonably perceive to bear the imprimatur of the school.

Id. at 270-71.

Ms. Corder argues that *Hazelwood* cannot be applied to graduation ceremonies because commencement exercises are "not part of the school's instructional program and could not be characterized as part of the curriculum." (Pet. 12.) As Ms. Corder puts it: "There were no more lessons to be learned, no educational purposes to be satisfied, and no academic requirements left unfulfilled. . . . The only remaining interaction between the valedictorians and the District was for the District to present the graduates with diplomas memorializing what they had already accomplished." (Pet. 21.)

While Ms. Corder is correct that graduation terminates a student's obligation to learn, a student's decision to stop learning does not require educators to stop teaching. Thus, graduation exercises are routinely staged, choreographed, and viewed as the final lesson of high school (rather than the first party after

high school). Here, the complaint made no allegations regarding who choreographed and supervised the ceremony, the character of the ceremony, and who paid for the site and supplies, or other indicia that might lead a court to reasonably infer that the commencement exercises of Lewis-Palmer High School departed from the traditional pomp, circumstance, and final words of wisdom that characterize traditional high school graduation ceremonies. While Ms. Corder might have hoped that the lower courts would make such an inference, those courts were not required to accept as true facts that Ms. Corder did not allege. *Contractors of Cal.*, 459 U.S. at 526. Instead, Ms. Corder was required to plead sufficient facts to demonstrate something more than a suspicion of liability on the part of school officials. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Here, Ms. Corder does not argue that the Tenth Circuit failed to apply the correct standard in deciding a motion for judgment on the pleadings.

Moreover, the *Hazelwood* analysis is not limited to formal classroom curricular exercises or the day-to-day instructional program. Instead, it extends to "school sponsored publications, theatrical productions, and *other expressive activities that students, parents and members of the community might reasonably perceive to bear the imprimatur of the school*." *Hazelwood*, 484 U.S. at 270-71 (emphasis added).

Here, the Court need not imagine, based on the skeletal facts that Ms. Corder alleged, whether a hypothetical reasonable observer would perceive that

the valedictory speech bore the imprimatur of the school. The allegations of her complaint make clear that the valedictory address *did bear* the school's imprimatur. An imprimatur is "a license to print or publish." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1137 (1986). Here, the complaint affirmatively alleges that graduation speakers were *required* to get the principal's approval before they were allowed to speak. (Compl. ¶¶ 27-28.) Thus, the Tenth Circuit's decision to apply *Hazelwood* is consistent with *Hazelwood*.

B. There is No Conflict Between Circuits.

Ms. Corder's argument that there is a conflict between circuits on this issue is off the mark. In fact, courts *uniformly* have upheld the authority of school officials to exercise editorial control over the remarks of student graduation speakers. *E.g., Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 981-82 (9th Cir. 2003) (school officials may require prior review of graduation address); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1096 (9th Cir. 2000) (same); *Ashby v. Isle of Wright County Sch. Bd.*, 354 F. Supp. 2d 616, 629 (E.D. Va. 2004).

In an effort to demonstrate a "conflict" between circuits, Ms. Corder cites a case – *Adler v. Duval County School Board*[3] – in which a school district

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[3] 206 F.3d 1070 (11th Cir. 2000).

chose to abdicate editorial control over student commencement addresses. (Pet. 13.) In *Adler*, the school's policy expressly provided that the content of any student message was to be "prepared by [a] student volunteer and [not] monitored or otherwise reviewed" by school officials. *Id.* at 1072. The student's message *might* be a broad nondenominational prayer, a narrowly sectarian prayer, an endorsement of a political candidate, an imitation of a rock star, an indictment of the status quo, or an exhortation to engage in unprotected sex with multiple partners. Since the policy prevented school officials from controlling the content of the message, the student's speech would be wholly private, creating a circuit-breaker that separates the student's speech – religious or otherwise – from government endorsement. *See generally Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002) (Establishment Clause not implicated when private citizen chooses to support religion). *Adler*, however, held only that such a policy is not facially unconstitutional. *Adler*, 206 F.3d at 1091. Thus, the case stands only for the proposition that the constitution *permits* school officials to abdicate control over graduation speeches. It does not stand for the proposition that the Constitution *requires* school officials to relinquish control over student graduation speeches. In the end, the "conflict" asserted by Ms. Corder is nothing more than different policy choices by different school boards, not different interpretations of the Constitution by different federal circuits.

Given the creativity and often limited maturity of high school students,[4] if school officials are required to choose between unsupervised student graduation speakers on one hand or no student graduation speakers on the other hand, school officials might well choose not to include any student speakers. *See generally Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 681-82 (1998) (requiring public entity to choose between "a cacophony on one hand, and First Amendment liability on the other" might lead public entity to choose no speech at all). "A First Amendment jurisprudence yielding these results does not promote speech but represses it." *Id.* at 682.

In sum, *Hazelwood* makes clear that the First Amendment does not prohibit school officials from requiring high school graduation speakers to submit their remarks to school officials for prior review. No federal court has held otherwise.

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[4] *See generally Morse v. Frederick*, 551 U.S. 393, 397 (2007) ("BONG HiTS 4 JESUS"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 687 (1986) ("I know a man who is firm – he's firm in his pants. . . ."); *Nuxoll ex rel. Nuxoll v. Indian Prairie School Dist. # 204*, 523 F.3d 668, 671 (7th Cir. 2008) ("Be Happy, Not Gay"); *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460 (7th Cir. 2007) (t-shirt highlight dispute between "gifties" and "tards"); *Guiles v. Marineau*, 461 F.3d 320, 322 (2nd Cir. 2006) (student t-shirt highlighted alleged drug use of President); *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005) ("Islam is a lie!").

C. The Compelled Speech Claim Does Not Present a Certworthy Issue.

Given that the school's prior review policy was constitutional, the next question is what limitation, if any, does the First Amendment place on a school district's authority to discipline a student who violates such a policy. Ms. Corder argues that the Constitution prohibits school officials from requiring students to apologize for misconduct because the apology constitutes "compelled speech."

This Court has long made clear that courts should not "intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). If Ms. Corder had been compelled to renounce her religious faith, she might have a claim that her constitutional rights were, in the words of *Epperson*, "directly and sharply implicated." *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (school officials may not compel student to recite the Pledge of Allegiance when doing so violates the student's religious beliefs). Ms. Corder's allegedly coerced statement, however, falls far short of a compelled oath of conscience: The statement reads as follows:

> At graduation I know some of you may have been offended by what I said during the valedictorian speech. I did not intend to offend anyone. I also want to make clear that Mr. Brewer did not condone nor was he

> aware of my plans before giving the speech. I'm sorry I didn't share my plans with Mr. Brewer or the other valedictorians ahead of time. The valedictorians were not aware of what I was going to say. These were my personal beliefs and may not necessarily reflect the beliefs of the other valedictorians or the school staff. I realize that had I asked ahead of time, I would not have been allowed to say what I did.

(Compl. ¶¶ 43-44.)

Reduced to its essentials, Ms. Corder's argument is that because the apology involved speech, and speech is a constitutional right, it follows that the apology violated the constitution.

As a practical matter, education is a speech-based endeavor, and students are routinely compelled to speak. They are compelled to acknowledge their presence during roll call; compelled to respond to questions; compelled to write assignments; compelled to give classroom presentations; and, compelled to produce answers to examination questions. Attempting to build a First Amendment framework that reaches into all corners of the educational enterprise would distort both education and First Amendment jurisprudence.

As a legal matter, Ms. Corder is correct that speech is a constitutional right. U.S. CONST. AMEND. I. The fact that speech is a constitutional right, however, does not end the inquiry. Life, liberty, and property are constitutional rights as well. U.S. CONST.

AMEND. XIV, § 1. Yet, the government may deprive persons of life, liberty and property so long as those deprivations are preceded by procedures minimizing the risk of an erroneous deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). In minor student discipline matters, the constitution requires only that a student have notice of the alleged wrongdoing, and the opportunity to explain her side of the story. *Goss v. Lopez*, 419 U.S. 565, 580-83 (1975). Here, of course, Ms. Corder's conduct was never in question. Thus, there was no chance of an erroneous deprivation.

Once misconduct has been identified, the disciplinary options available to school officials under the Constitution are very broad extending even to corporal punishment. *Ingraham v. Wright*, 430 U.S. 651, 678 (1977) ("In the ordinary case, a disciplinary paddling neither threatens to violate any substantive right nor condemns the child to suffer grievous loss of any kind.") (internal citation and quotation omitted). In fact,

> [s]uch leeway is particularly necessary when school discipline is involved. The Court has noted the 'substantial interest of teachers and administrators in maintaining discipline in the classroom.' Educators must be able to respond effectively to the disciplinary exigencies of the moment. They must also be able to tailor these responses to the peculiar remedial needs that exist in particular schools. The Supreme Court has long recognized that educators are best situated to

> identify those needs and optimize their implementation.

Wofford v. Evans, 390 F.3d 318, 323 (4th Cir. 2004) (internal citations omitted).

As the Tenth Circuit recognized in another recent case, "If corporal punishment is a constitutionally acceptable form of discipline for a student's defiance, it is implausible that timeouts are not." *Couture v. Bd. of Educ.*, 535 F.3d 1243, 1253-54 (10th Cir. 2008). The same can easily be said of compelled apologies which have long been a standard practice in public education and have never been seriously questioned by courts. *See generally Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768 (8th Cir. 2001); *Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647, 659-60 (W.D. Tex. 2000); *Kicklighter v. Evans County Sch. Dist.*, 968 F. Supp. 712, 719 (S.D. Ga. 1997).

As the Tenth Circuit noted, this Court has held that the difference between compelled speech and compelled silence is "without constitutional significance." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988). Similarly, this Court has held that the constitutional rights of student are not automatically coextensive with the rights of adults in other settings. *Morse*, 551 U.S. at 396-97. Thus, the Tenth Circuit reviewed the constitutionality of the school's discipline of Ms. Corder under *Hazelwood*, the framework established by this Court for managing speech questions that arise in the school setting. As a result, the Tenth Circuit's decision to

apply *Hazelwood* does not represent such a dramatic departure from the accepted course of judicial proceedings as to warrant an exercise of the Court's supervisory power. Moreover, the Tenth Circuit's decision to apply *Hazelwood* is consistent with the only other federal appellate court to address the issue. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178 (3rd Cir. 2005) ("School sponsored speech may be restricted for legitimate educational purposes, and it seems clear that a school may compel some speech for such purposes."). Thus, there is no split in the federal circuits.

Hazelwood holds that educators may regulate school sponsored speech as long as those regulations are reasonably related to legitimate pedagogical concerns. 484 U.S. at 273. Thus, in the context of student apologies, the dispositive question is whether the apology is reasonably related to legitimate pedagogical concerns.

More specifically here, the question is whether Mr. Brewer had a legitimate educational reason to demand (1) that Ms. Corder clarify that her religious exhortations were not previously approved by school officials; (2) that Ms. Corder apologize to the principal and fellow valedictorians for deceiving them as to what she intended to say at graduation; and (3) that Ms. Corder acknowledge that had she asked ahead of time she would not have been allowed to say what she said.

Hazelwood makes clear that legitimate pedagogical concerns go beyond correcting speech that violates the rules of grammar:

> A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order or to associate the school with any position other than neutrality on matters of political controversy.[5]

Id. at 272.

As to the first question – whether Mr. Brewer had a legitimate educational reason for compelling Ms. Corder to clarify that her religious exhortations were not previously approved by school officials –

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[5] Thus, *Hazelwood*'s legitimate pedagogical concerns standard occupies a middle ground between private speech that is broadly protected by the First Amendment and government speech to which the First Amendment does not apply. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833-34 (1995) ("When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."); *Rust v. Sullivan*, 500 U.S. 173 (1991) (First Amendment not offended when government supports discussion of family planning services but prohibits discussion of abortion as a family planning option). Under *Hazelwood* school sponsored speech is not completely beyond the reach of the First Amendment. Instead, educators' decisions must be reasonably related to legitimate pedagogical concerns. 484 U.S. at 273.

Hazelwood allows school officials to regulate speech in such a way as to insure that the school is not aligned with a position other than neutrality on matters of public controversy. *Id.* When it comes to matters of religion, public officials are *required* to remain neutral. *McCreary County v. Am. Civil Liberties Union*, 545 U.S. 844 (2005). Here, Ms. Corder evaded the review process and effectively forged Mr. Brewer's imprimatur on a valedictory speech that urged the audience to learn more about Christ so that they could live with Him in eternity. Certainly, Mr. Brewer had a legitimate educational interest in insuring the school community knew that Ms. Corder's call to adopt the Christian faith was her own religious advice, and not the religious advice of school officials.

As to the second question – whether Mr. Brewer had a legitimate educational interest in requiring Ms. Corder to apologize for presenting Mr. Brewer and her fellow valedictorians with one set of remarks and then concluding the speech with a different set of remarks at graduation – the Constitution does not protect duplicity.[6] *See generally Cohen v. Cowles Media Inc.*, 501 U.S. 663 (1991) (reporter does not have constitutional right to break promise of confidentiality). As noted above, it is common practice for schools to require students to apologize when they misbehave. *Wildman*, 249 F.3d 768; *Riggan*, 86

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[6] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 703 (1986) (duplicity is "deception by pretending to entertain one set of feelings and acting under the influence of another").

F. Supp. 2d 647; *Kicklighter*, 968 F. Supp. 712. Given that the facts alleged by Ms. Corder demonstrate that she told Mr. Brewer and her fellow valedictorians that she was going to do one thing, and then proceeded to do something completely different, there is no question that Ms. Corder engaged in misconduct. School officials clearly have a legitimate interest in requiring students to apologize for misconduct.

As to the third question – whether Mr. Brewer had a legitimate educational reason for requiring Ms. Corder to acknowledge that had she asked ahead of time she would not have been allowed to say what she said – there is an unbroken line of cases demonstrating that had Ms. Corder asked to close the valedictory address by encouraging the audience to accept Christ's salvation, school officials would have been fully empowered to tell her that she could not do so. *Lassonde*, 320 F.3d at 981-82; *Cole*, 228 F.3d at 1096; *Ashby*, 354 F. Supp. 2d at 629. These cases are entirely consistent with *Hazelwood*'s holding that: "A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to . . . *associate the school with any position other than neutrality on matters of political controversy*." 484 U.S. at 272 (emphasis added). Schools clearly have a legitimate educational interest in not getting drawn into debates regarding the proper source for religious salvation. Thus, Ms. Corder was required to recite a correct principle of law, no different than a student who is compelled to acknowledge: "I realize that had I asked ahead of time I

would not have been allowed to smoke in the lavatory." While Ms. Corder may disagree with the legal principle, generations of students have been required to acknowledge the boundaries of school authority whether they liked those boundaries or not. Generations of law students have had their graduation, not mere receipt of a diploma that *symbolizes* graduation, conditioned upon accurately reciting principles of constitutional law with which they disagree.[7]

In the end Ms. Corder made a miscalculation that is common to many graduating seniors: "Since I'm a high school graduate," they reason, "the principal can't discipline me." The miscalculation is that while the students may have graduated, they have not yet been presented with, as Ms. Corder puts it, the "diploma[] memorializing what they had already accomplished." (Pet. 21.) By withholding the memorialization of graduation until after commencement exercises, school officials are able to insure good behavior during the commencement exercises. Ms. Corder asks this Court to put this disciplinary leverage beyond the reach of school officials as a matter of constitutional law. The Tenth Circuit declined to do so, a decision that is consistent with the precedents of this Court and unanimously supported by the decisions of other courts.

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[7] Ms. Corder does not allege that Mr. Brewer threatened to withhold her transcripts.

CONCLUSION

WHEREFORE, the Respondent respectfully asks that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

Section 22-1-120 of the Colorado Revised Statutes provides:

(1) The general assembly declares that students of the public schools shall have the right to exercise freedom of speech and of the press, and no expression contained in a student publication, whether or not such publication is school-sponsored, shall be subject to prior restraint except for the types of expression described in subsection (3) of this section. This section shall not prevent the advisor from encouraging expression which is consistent with high standards of English and journalism.

(2) If a publication written substantially by students is made generally available throughout a public school, it shall be a public forum for students of such school.

(3) Nothing in this section shall be interpreted to authorize the publication or distribution in any media by students of the following:

(a) Expression that is obscene;

(b) Expression that is libelous, slanderous, or defamatory under state law;

(c) Expression that is false as to any person who is not a public figure or involved in a matter of public concern; or

(d) Expression that creates a clear and present danger of the commission of unlawful acts, the violation of lawful school regulations, or the material and substantial disruption of the orderly operation of the school or that violates the rights of others to privacy or that threatens violence to property or persons.

(4) The board of education of each school district shall adopt a written publications code, which shall be consistent with the terms of this section, and shall include reasonable provisions for the time, place, and manner of conducting free expression within the school district's jurisdiction. The publications code shall be distributed, posted, or otherwise made available to all students and teachers at the beginning of each school year.

(5)(a) Student editors of school-sponsored student publications shall be responsible for determining the news, opinion, and advertising content of their publications subject to the limitations of this section. It shall be the responsibility of the publications advisor of school-sponsored student publications within each school to supervise the production of such publications and to teach and encourage free and responsible expression and professional standards for English and journalism.

(b) For the purposes of this section, "publications advisor" means a person whose duties include the supervision of school-sponsored student publications.

(6) If participation in a school-sponsored publication is part of a school class or activity for which grades or school credits are given, the provisions of this section shall not be interpreted to interfere with the authority of the publications advisor for such school-sponsored publication to establish or limit writing assignments for the students working with the publication and to otherwise direct and control the learning experience that the publication is intended to provide.

(7) No expression made by students in the exercise of freedom of speech or freedom of the press shall be deemed to be an expression of school policy, and no school district or employee, or parent, or legal guardian, or official of such school district shall be held liable in any civil or criminal action for any expression made or published by students.

(8) Nothing in this section shall be construed to limit the promulgation or enforcement of lawful school regulations designed to control gangs. For the purposes of this section, the definition of "gang" shall be the definition found in section 19-1-103 (52), C.R.S.

143 (3)

No. 09-257

Supreme Court, U.S.
FILED
OCT 26 2009
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ERICA CORDER,
Petitioner

v.

LEWIS PALMER SCHOOL DISTRICT No. 38,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

LEGAL ARGUMENT 1

I. THE DISTRICT'S OMISSION OF *TINKER* DOES NOT ERASE THE TENTH CIRCUIT'S ERROR IN USING *KUHLMEIER* INSTEAD OF *TINKER* TO ANALYZE PETITIONER'S CLAIMS. .. 1

II. THE CONFLICT BETWEEN THE TENTH CIRCUIT AND OTHER CIRCUITS IS NOT ERASED BY THE DISTRICT'S FAILURE TO DISCUSS THE CONFLICTING RULINGS. 6

III. THE DISTRICT'S FALSE PRESUMPTIONS DO NOT REMEDY THE SIGNIFICANT CONSTITUTIONAL INFIRMITIES IN THE TENTH CIRCUIT'S DENIAL OF THE COMPELLED SPEECH CLAIM. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Adler v. Duval County School Board,
250 F.3d 1330 (11th Cir. 2001) 7, 8

Ashby v. Isle of Wight County School Bd.,
354 F. Supp. 2d 616 (E.D. Va. 2004) 7

Bertot v. School Dist. No. 1,
522 F.2d 1171 (10th Cir. 1975) 9

Bethel School District No. 403 v. Fraser,
478 U.S. 675 (1986) 2, 4

Bd of Educ., Island Trees Union Free School Dist. No. 26 v. Pico,
457 U.S. 853 (1982) 10

Chandler *v. James,*
180 F.3d 1254 (11th Cir. 1999) 7

Cole v. Oroville Union High School Dist.,
228 F.3d 1092 (9th Cir. 2000) 7

Elk Grove Unified School Dist. v. Newdow,
542 U.S. 1 (2004) 9

Hazelwood School District v. Kuhlmeier,
484 U.S. 260 (1988) 1, 2, 4, 6, 10

Ingebretsen v. Jackson Public School Dist.,
88 F.3d 274 (5th Cir. 1996) 6

Lassonde v. Pleasanton Unified School Dist.,
320 F.3d 979 (9th Cir. 2003) 7

Morse v. Frederick,
551 U.S. 393 (2007) 2, 9

Nebraska Press Ass'n. v. Stuart,
427 U.S. 539 (1975) 9

Tinker v. Des Moines Indep. Community School Dist.,
393 U.S. 503 (1969) 1, 2

West Virginia Board of Education v. Barnette,
319 U.S. 624 (1943) 9

LEGAL ARGUMENT

Respondent Lewis-Palmer School District No. 38 ("the District") tries to convince this Court that there is no misapplication of its precedents and no inter-circuit conflicts by failing to address the precedents which conflict with the Tenth Circuit's ruling. The District also cites to allegations in the Complaint and offers commentary on allegations it claims are not present in the Complaint. The District's strategy demonstrates even more clearly that Petitioner Erica Corder's ("Petitioner") Petition for a Writ of Certiorari should be granted.

I. THE DISTRICT'S OMISSION OF *TINKER* DOES NOT ERASE THE TENTH CIRCUIT'S ERROR IN USING *KUHLMEIER* INSTEAD OF *TINKER* TO ANALYZE PETITIONER'S CLAIMS.

The District incorrectly asserts that *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), is the proper analytical framework for Petitioner's claims, and erroneously states that *Kuhlmeier* is the **only** standard under which student speech cases are analyzed. (Opposition Brief, p. 16) ("*Hazelwood*, the framework established by this Court for managing speech questions that arise in the school setting."). Neither *Kuhlmeier*, nor any other precedent, is a "one size fits all" solution to all student free speech questions.

In *Kuhlmeier*, this Court reiterated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," as established in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503,

506 (1969). *Kuhlmeier*, 484 U.S. at 266. Students cannot be punished for merely expressing their views on school premises unless authorities have reason to believe that the expression will substantially interfere with the work of the school or impinge upon other students' rights. *Id.* (citing *Tinker*, 393 U.S. at 509, 512-513). Cases subsequent to *Tinker* have clarified that students' rights are not "coextensive" with the rights of adults in non-school settings, but must be analyzed in light of the special circumstances of the school environment. *Id.* (citing *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Tinker*, 393 U.S. at 506). *Kuhlmeier* did not replace *Tinker*, but elucidated how the "special circumstances of the school environment" can affect the rights established in *Tinker*. *Id.* at 271. As this Court explained, *Tinker* addressed the question of whether educators can silence a student's personal expression that happens to occur at school, while *Kuhlmeier* addressed educators' authority over "school-sponsored publications, theatrical productions, and other expressive activities" that could be perceived as bearing the school's imprimatur. *Id.* This Court's finding that educators could exercise greater control over student speech in the latter circumstance did not abrogate the rights established in *Tinker*. *See Morse v. Frederick*, 551 U.S. 393, 403-405 (2007) (affirming that *Tinker* remains the baseline standard for student free speech rights, subject to qualifications established by *Fraser*, *Kuhlmeier* and *Morse*).

Nevertheless, the District implicitly asserts that *Tinker* is no longer good law when it attempts to defend the Tenth Circuit's use of *Kuhlmeier* while completely ignoring *Tinker*. (Opposition Brief, pp. 7-10). Rather than analyzing all of this Court's student speech precedents, the District merely

concludes that the Tenth Circuit was correct to use *Kuhlmeier* because *Kuhlmeier* is the only standard it could have used. (Opposition Brief, p. 16). By omitting *Tinker* from its analysis, the District could claim that expanding *Kuhlmeier* to valedictory speeches is wholly consistent with this Court's precedents. (Opposition Brief, p. 7).

However, *Tinker*'s absence from the District's discussion does not erase *Tinker* or resolve the conflict apparent in the Tenth Circuit's ruling. This Court has consistently re-affirmed the continuing viability of *Tinker*'s protection of students' constitutional rights. *See Morse*, 551 U.S. at 396 (reiterating that "[o]ur cases make clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" even while holding that the school properly sanctioned a student for unfurling a banner with a pro-drug message). *Fraser*, *Kuhlmeier* and *Morse* represent carefully crafted limitations upon student speech in specific settings and under specific circumstances: sexually-charged speeches at school assemblies (*Fraser*), articles regarding divorce and teen pregnancy in journalism assignments (*Kuhlmeier*), and pro-drug messages during a school gathering in the community (*Morse*). At no point has this Court placed all student expression under the control of school administrators, as the District asserts.

The Tenth Circuit recognized the continuing validity of *Tinker*, but departed from *Tinker*'s core tenet of protection of a student's individual First Amendment rights when it rejected *Tinker* in favor of *Kuhlmeier*. The Tenth Circuit reasoned that a high school commencement ceremony occurring after students have completed their education is the

same as a journalism class so that individual speeches given at the ceremony can be regulated as strictly as are homework assignments. (App. at 18a-19a). That conclusion contradicts this Court's reasoning in *Kuhlmeier* by contravening this Court's definitions of "school-sponsored" and "imprimatur."

In *Kuhlmeier*, this Court carefully defined the exception it was drawing to *Tinker*. The Court emphasized that educators cannot punish students for expressing their views on the school premises, but can control the manner of speech that occurs in the classroom or in a mandatory assembly held during the school day. *Kuhlmeier*, 484 U.S. at 266-267. That meant that educators could discipline a student for offering a sexually explicit speech during an assembly, *Fraser*, 478 U.S. at 683, and could remove articles about divorce and teen pregnancy from a newspaper that was created as part of a journalism class. *Kuhlmeier*, 484 U.S. at 266-267. In each of those instances, the events could be considered part of the school's curriculum in that they were supervised by faculty and designed to impart particular knowledge or skills to student participants. *Id.* at 271. In both cases, this Court emphasized the nexus between the activities and the ongoing educational program of which the student participants were still a part. *Id.*; *Fraser*, 478 U.S. at 683.

No such nexus is present in this case. The event was not a school-day assembly, field trip, theatrical production or class assignment designed to impart skills or knowledge to students. Instead, it was a commencement ceremony, an honorary gathering honoring the students' completion of their educational program. The graduates had obtained the knowledge and the skills that the District required be imparted to them and were now being recognized for their

accomplishment. Nevertheless, the Tenth Circuit reasoned that the ceremony was "school-sponsored" because the District "chose" the valedictory speakers. (App., 20a). However, students were not "chosen" by administrators, but earned the title of valedictorian by completing their education with a 4.0 GPA. (App., 20a). Similarly, the valedictorians chose whether any or all of them would speak and what their topics would be. (App., 38a). It was not, as the Tenth Circuit claimed, a faculty supervised activity similar to the journalism class in *Kuhlmeier*. (App., 20a). The optional speeches presented after the completion of academic requirements do not bear the indicia of school sponsorship present in the journalism class assignment in *Kuhlmeier*.

The District attempts to bring the commencement ceremony under the "school-sponsored" umbrella by claiming that the ceremony was intended to impart lessons to students, like the newspaper in *Kuhlmeier*. (Opposition Brief, p. 8). The District admits that graduation terminates a student's obligation to learn, but then says "a student's decision to stop learning does not require educators to stop teaching." (Opposition Brief, p. 8). The District does not explain how an educator's unilateral decision to try to teach something to a graduate who is no longer obligated to accept the instruction can create a legally enforceable right sufficient to override *Tinker*'s protection of student speech. Nor does the District explain how the fact that *Kuhlmeier* is not limited to formal classroom curricular exercises leads to the conclusion that the commencement ceremony is "school-sponsored." The District states that *Kuhlmeier* applies to "publications, theatrical productions and *other expressive activities that students, parents and members of the community might reasonably perceive to bear the imprimatur of the school,*" and then leaps

to the conclusion that the emphasized phrase describes the commencement ceremony. (Opposition Brief p. 9, citing *Kuhlmeier*, 484 U.S. at 270-271 with emphasis added).

The District offers no analysis to demonstrate how the commencement ceremony falls within this Court's carefully crafted exception to *Tinker*. Instead, the District discusses allegations that are purportedly not in Petitioner's Complaint, and argues that the absence of those facts prove the presence of school sponsorship under *Kuhlmeier*. (Opposition Brief at pp. 9-10). That disjointed and illogical narrative contravenes this Court's cautious approach to limitations on student speech and illustrates why the petition should be granted.

II. THE CONFLICT BETWEEN THE TENTH CIRCUIT AND OTHER CIRCUITS IS NOT ERASED BY THE DISTRICT'S FAILURE TO DISCUSS THE CONFLICTING RULINGS.

The conflict between the Tenth Circuit's conclusion that a student-initiated religious reference at graduation is school-sponsored speech and other circuits' that it is private student speech could hardly be clearer. The Tenth Circuit ruled that a student-initiated reference to religion during a commencement speech was "school-sponsored." (App.,21a). The Fifth Circuit ruled that student-initiated voluntary prayer offered during commencement was not "school-sponsored." *Ingebretsen v. Jackson Public School Dist.* 88 F.3d 274, 280 (5th Cir. 1996). The Eleventh Circuit made similar rulings and emphasized: "The first principle must always be that genuinely student-initiated religious speech must be permitted. A student's individual decision to pray or otherwise speak religiously is not the State's command."

Chandler v. James, 180 F.3d 1254, 1264 (11th Cir. 1999); *See also, Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (en banc), discussed below.

The District denies that there is any conflict. Instead, the District claims that circuit courts have uniformly upheld the right of school districts to control student graduation speeches. (Opposition Brief at p. 10). The District makes this assertion by failing to cite *Ingebretsen* or *Chandler*, misstating the facts and holding in *Adler*, and citing but not analyzing two Ninth Circuit and one district court case. (Opposition Brief, at pp. 10-11) (citing *Lassonde v. Pleasanton Unified School Dist.*, 320 F.3d 979 (9th Cir. 2003); *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092 (9th Cir. 2000) and *Ashby v. Isle of Wight County School Bd.*, 354 F. Supp. 2d 616 (E.D. Va. 2004)). In *Lassonde*, *Cole* and *Ashby*, the courts found that the districts' control over the entire graduation ceremony justified their actions. *Lassonde*, 320 F.3d at 981; *Cole*, 228 F.3d at 1096; *Ashby*, 354 F. Supp. 2d at 631. There is no record of comparable control in this case. More importantly, even if *Lassonde* and *Cole* were seen as consistent with the Tenth Circuit's holding, those four cases conflict with *Ingebretsen*, *Chandler*, and *Adler*. The District's omission does not erase the conflict.

Neither does the District's creative rewriting of *Adler* resolve the conflict. The factual similarity and contrasting legal holdings in *Adler* and this case illustrate the circuit conflict that this Court should resolve. The District attempts to disprove the conflict by falsely painting *Adler* as a case of a rogue school district abdicating its authority, even to the point of permitting a student to give "an exhortation to engage

in unprotected sex with multiple partners." (Opposition Brief, p. 11). The District then distorts the holding in *Adler* as granting school officials permission to abdicate control over graduation ceremonies. (Opposition Brief, p. 11). Actually, the Eleventh Circuit held that graduation speeches presented by students under a policy in which students choose whether there will be a speech, who will speak, and what the topic will be is not school-sponsored. *Adler*, 250 F.32d at 1338. In this case, the Tenth Circuit held that graduation speeches presented by students under a policy in which students choose whether there will be a speech, who will speak and what the topic will be is school-sponsored. (App., 20a). That conflict should be resolved by this Court.

III. THE DISTRICT'S FALSE PRESUMPTIONS DO NOT REMEDY THE SIGNIFICANT CONSTITUTIONAL INFIRMITIES IN THE TENTH CIRCUIT'S DENIAL OF THE COMPELLED SPEECH CLAIM.

The District asks this Court to accept as true that "the school's prior review policy was constitutional" and that the Tenth Circuit properly found that the District could discipline Petitioner by compelling her to apologize in a prescribed way before receiving her diploma. (Opposition Brief, p. 13). That being the case, according to the District, there is no need for this Court to review the Tenth Circuit's denial of Petitioner's compelled speech claim. The District's underlying presumptions are false, as is its claim that the Tenth Circuit's denial of the compelled speech claim comports with precedent.

Neither the district court nor the Tenth Circuit

determined whether the District's policy of having the principal review valedictory speeches prior to graduation was constitutional. Nevertheless, the District claims that this Court should accept as "given" that the District's policies are constitutional and sufficient to justify its sanctions against Petitioner's speech. (Opposition Brief, pp. 6, 13). The Tenth Circuit adopted the District's position without analyzing the policies, despite this Court's strong condemnation of prior restraints, *See Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 559 (1975) (prior restraints are "the most serious and the least tolerable infringement on First Amendment rights"), and its own rejection of disciplinary sanctions for First Amendment activities. *Bertot v. School Dist. No. 1*, 522 F.2d 1171, 1183 (10th Cir. 1975). The District argued and Tenth Circuit erroneously determined that *Kuhlmeier*'s grant of limited authority over school-sponsored speech somehow trumps protection against prior restraints. According to the Tenth Circuit, *Kuhlmeier* was also a grant of authority to use deprivation of First Amendment rights as "leverage" against "bad behavior." (Opposition Brief, p. 21; App., 25a-26a). That unwarranted expansion of *Kuhlmeier* is inconsistent with the carefully constructed limitations of the *Kuhlmeier* decision and contradicts this Court's continuing protection of student free speech rights under Tinker. *See Morse,*, 551 U.S. at 403-405.

The Tenth Circuit's denial of Petitioner's compelled speech claim also conflicts with this Court's holding in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 631 (1943). As former Chief Justice Rehnquist stated, "Compulsion, after *Barnette*, is not permissible...." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring). Nevertheless, the Tenth Circuit

found no error in the District compelling Petitioner to apologize, using certain language, under the threat of not receiving her diploma. (App., 26a). The District attempts to justify the Tenth Circuit's holding by claiming that *Barnette* is inapplicable because Petitioner was not required to renounce her faith. (Opposition Brief, p. 13). That conclusion not only misrepresents *Barnette*'s holding, but also conflicts with this Court's continuing protection of First Amendment rights in school settings. *See Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864-865 (1982) ("we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment").

This Court has established that educators must temper their pedagogical authority with due consideration of students' First Amendment rights. Educators are to strike a balance between authoritative discipline and student free speech. *Id.* That balance is not achieved by using deprivation of First Amendment rights as "disciplinary leverage" to compel "good behavior," as the District asserts. (Opposition Brief, p. 21). The mere possibility that the District could use students' First Amendment rights as "leverage" to compel conformance and the Tenth Circuit would sanction such a concept is reason enough to review the Tenth Circuit's decision.

CONCLUSION

The Tenth Circuit misapplied this Court's student speech precedents when it rejected *Tinker* in favor of *Kuhlmeier* as the standard for Petitioner's claims. The Tenth

Circuit's findings that the graduation speeches are part of school-sponsored events bearing the imprimatur of the school conflicts with precedents in the Court and in other circuits. Denying Petitioner's compelled speech claim conflicts with this Court's student speech and compelled speech precedents.

For these reasons, Petitioner respectfully requests that this Court grant her Petition.

Dated: October 23, 2009.

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